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Calendar No. 171

101st Congress *1st Session*	SENATE	Report 101-86

COURT OF VETERANS APPEALS JUDGES RETIREMENT ACT

REPORT

OF THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1243

July 25 (legislative day, January 3), 1989.—Ordered to be printed

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COURT OF VETERANS APPEALS JUDGES RETIREMENT ACT

July 25 (legislative day, January 3), 1989.—Ordered to be printed

Mr. Cranston, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany S. 1243]

The Committee on Veterans' Affairs, to which was referred the bill (S. 1243) to amend title 38, United States Code, to establish a retirement and survivor benefit program for judges of the new United States Court of Veterans Appeals, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a committee substitute, and recommends that the bill, as amended, do pass.

Committee Amendments

The amendments are as follows:

Strike out all after the enacting clause as follows:

[SECTION 1. SHORT TITLE.

[This Act may be cited as the "Court of Veterans Appeals Judges Retirement Act".

[TITLE I—JUDGES RETIREMENT AND SURVIVOR ANNUITY PROGRAM

[SEC. 101. JUDGES RETIREMENT PROGRAM.

[(a) Retirement System.—Chapter 72 of title 38, United States Code, is amended by adding at the end the following new subchapter:

["SUBCHAPTER V—RETIREMENT AND SURVIVORS ANNUITIES

["§ 4096. Retirement of judges

["(a) For purposes of this section:

["(1) The term 'Court' means the United States Court of Veterans Appeals.

[“(2) The term ‘judge’ means the chief judge or an associate judge of the Court.

[“(b)(1) A judge who meets the age and service requirements set forth in the following table may retire:

“The judge has attained age:	And the years of service as a judge are at least
65	15
66	14
67	13
68	12
69	11
70	10

[“(2) A judge who is not reappointed following the expiration of the term for which appointed may retire upon the completion of that term if the judge has served as a judge of the Court for 15 years or more. In order to retire under this paragraph, a judge must, not earlier than nine months preceding the date of the expiration of the judge’s term of office and not later than 6 months preceding such date, advise the President in writing that the judge is willing to accept reappointment to the Court.

[“(3) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall retire.

[“(c)(1) An individual who retires under subsection (b) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall (except as provided in paragraph (2) of this subsection) receive retired pay at the rate of pay in effect at the time of retirement.

[“(2) An individual who serves as a judge for less than 10 years and who retires under subsection (b)(3) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall receive retired pay at a rate equal to one-half of the rate of pay in effect at the time of retirement.

[“(3) Retired pay under this subsection shall begin to accrue on the day following the day on which the individual’s salary as judge ceases to accrue and shall continue to accrue during the remainder of the individual’s life. Retired pay under this subsection shall be paid in the same manner as the salary of a judge.

[“(d)(1) A judge may elect to receive retired pay under subsection (c) of this section. Such an election—

[“(A) may be made only while an individual is a judge (except that, in the case of an individual who fails to be reappointed as judge at the expiration of a term of office, the election may be made at any time before the date after the day on which the individual’s successor takes office); and

[“(B) may not be revoked after the retired pay begins to accrue.

[“(2) In the case of a judge other than the chief judge, such an election shall be made by filing notice of the election in writing with the chief judge. In the case of the chief judge, such an election shall be made by filing notice of the election in writing with the Director of the Office of Personnel Management.

[“(3) The chief judge shall transmit to the Director of the Office of Personnel Management a copy of each notice filed with the chief judge under this subsection.

[“(e) If an individual for whom an election to receive retired pay under subsection (c) is in effect accepts compensation for employment with the United States, the individual shall, to the extent of the amount of that compensation, forfeit all rights to retired pay under subsection (c) of this section for the period for which the compensation is received.

[“(f)(1) Except as otherwise provided in this subsection, the provisions of the civil service retirement laws (including the provisions relating to the deduction and withholding of amounts from basic pay, salary, and compensation) shall apply with respect to service as a judge as if this section had not been enacted.

[“(2) In the case of any individual who has filed an election to receive retired pay under subsection (c) of this section—

[“(A) no annuity or other payment shall be payable to any person under the civil service retirement laws with respect to any service performed by such individual (whether performed before or after such election is filed and whether performed as judge or otherwise);

[“(B) no deduction for purposes of the Civil Service Retirement and Disability Fund shall be made from retired pay payable to that individual under subsection (c) of this section or from any other salary, pay, or compensation payable to that individual, for any period beginning after the day on which such election is filed; and

["(C) such individual shall be paid the lump-sum credit computed under section 8331(8) of title 5 upon making application therefor with the Office of Personnel Management.

["(g)(1) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall certify to the President in writing that such permanent disability exists. If the chief judge retires for such a disability, the retirement of the chief judge shall not take effect until concurred in by the President. If any other judge retires for such a disability, the chief judge shall furnish to the President a certificate of disability signed by the chief judge.

["(2) Whenever the President finds that a judge has become permanently disabled and as a result of that disability is unable to perform the duties of the office, the President shall declare that judge to be retired. Before a judge may be retired under this paragraph, the judge shall be provided with a full specification of the reasons for the retirement and an opportunity to be heard.

["(h)(1) An individual who has filed an election to receive retired pay under subsection (c) of this section may revoke such election at any time before the first day on which retired pay would (but for such revocation) begin to accrue with respect to such individual.

["(2) Any revocation under this subsection shall be made by filing a notice of the election in writing with the Director of the Office of Personnel Management. The Office of Personnel Management shall transmit to the chief judge a copy of each notice filed under this subsection.

["(3) In the case of a revocation under this subsection—

["(A) for purposes of this section, the individual shall be treated as not having filed an election to receive retired pay under subsection (c) of this section;

["(B) for purposes of section 4097 of this title—

["(i) the individual shall be treated as not having filed an election under section 4097(b) of this title, and

["(ii) section 4097(e) of this title shall not apply, and the amount credited to such individual's account (together with interest at 3 percent per year, compounded on December 31 of each year to the date on which the revocation is filed) shall be returned to the individual;

["(C) no credit shall be allowed for any service as a judge of the Court unless with respect to such service either there has been deducted and withheld the amount required by the civil service retirement laws or there has been deposited in the Civil Service Retirement and Disability Fund an amount equal to the amount so required, with interest;

["(D) the Court shall deposit in the Civil Service Retirement and Disability Fund an amount equal to the additional amount it would have contributed to such Fund but for the election under subsection (d); and

["(E) if subparagraph (D) of this paragraph is complied with, service on the Court shall be treated as service with respect to which deductions and contributions had been made during the period of service.

["(i)(1) Beginning with the next pay period after the Director of the Office of Personnel Management receives a notice under subsection (d) of this section that a judge has elected to receive retired pay under this section, the Director shall deduct and withhold 1 percent of the salary of such judge. Amounts shall be so deducted and withheld in a manner determined by the Director. Amounts deducted and withheld under this subsection shall be deposited in the Treasury of the United States to the credit of the Court of Veterans Appeals Judges Retirement Fund. Deductions under this subsection from the salary of a judge shall terminate upon the retirement of the judge or upon the completion of 15 years of service for which either deductions under this subsection or a deposit under subsection (j) of this section has been made, whichever occurs first.

["(2) Each judge who makes an election under subsection (d) of this section shall be considered to agree to the deductions from salary which are made under paragraph (1) of this subsection.

["(j) A judge who makes an election under subsection (d) of this section shall deposit, for service performed before the election for which contributions may be made under this section, an amount equal to 1 percent of the salary received for the first years, not exceeding 15 years, of that service. Retired pay may not be allowed until a deposit required by this subsection has been made.

["(k) The amounts deducted and withheld under subsection (i) of this section, and the amounts deposited under subsection (j) of this section, shall be deposited in the Court of Veterans Appeals Retirement Fund for credit to individual accounts in the name of each judge from whom such amounts are received.

["§ 4097. Survivor annuities

["(a) DEFINITIONS.—For purposes of this section:

["(1) The term 'Court' means the United States Court of Veterans Appeals.

["(2) The term 'judge' means the chief judge or an associate judge of the Court.

["(3) The term 'pay' means salary received under section 4053(e) of this title and retired pay received under section 4096(c) of this title.

["(4) The term 'retirement fund' means the Court of Veterans Appeals Retirement Fund established under section 4098 of this title.

["(5) The term 'surviving spouse' means a surviving spouse of an individual who (A) was married to such individual for at least 2 years immediately preceding the individual's death, or (B) is a parent of issue by the marriage.

["(6) The term 'dependent child' has the meaning given the term 'child' in section 376(a)(5) of title 28.

["(7) The term 'Member of Congress' means a Representative, a Senator, a Delegate to Congress, or the Resident Commissioner of Puerto Rico.

["(b) A judge may become a participant in the annuity program under this section by filing a written election under this subsection while in office. Any such election shall be made in such manner as may be prescribed by the Court.

["(c) There shall be deducted and withheld each pay period from the pay of a judge who has made an election under subsection (b) of this section a sum equal to 3.5 percent of the judge's pay. Amounts so deducted and withheld shall be deposited in the retirement fund. A judge who makes an election under subsection (b) of this section shall be considered by that election to agree to the deductions from the judge's pay required by this subsection.

["(d) A judge who makes an election under subsection (b) of this section shall deposit, with interest at 3 percent per year compounded on December 31 of each year, to the credit of the retirement fund, an amount equal to 3.5 percent of the judge's pay and of the judge's basic salary, pay, or compensation for service as a Member of Congress, and for any other civilian service within the purview of section 8332 of title 5. Each such judge may elect to make such deposits in installments during the judge's period of service in such amount and under such conditions as may be determined in each instance by the chief judge. Notwithstanding the failure of a judge to make such deposit, credit shall be allowed for the service rendered, but the annual annuity of the surviving spouse of such judge shall be reduced by an amount equal to 10 percent of the amount of such deposit, computed as of the date of the death of such judge, unless the surviving spouse elects to eliminate such service entirely from credit under subsection (k) of this section. However, a deposit shall not be required from a judge for any year with respect to which deductions from the judge's pay, or a deposit, were actually made (and not withdrawn) under the civil service retirement laws.

["(e) If the service of a judge who makes an election under subsection (b) of this section terminates other than pursuant to the provisions of section 4096 of this title, or if any judge ceases to be married after making the election under subsection (b) of this section and revokes (in a writing filed as provided in subsection (b) of this section) such election, the amount credited to the judge's individual account (together with interest at 3 percent per year compounded on December 31 of each year to the date of the judge's relinquishment of office) shall be returned to the judge. For the purpose of this section, the service of a judge making an election under subsection (b) of this section shall be considered to have terminated pursuant to section 4096 of this title if—

["(1) the judge is not reappointed following expiration of the term for which appointed; and

["(2) at or before the time of the expiration of that term, the judge is eligible for and elects to receive retired pay under section 4096 of this title.

["(f)(1) If a judge who makes an election under subsection (b) of this section dies after having rendered at least 5 years of civilian service (computed as prescribed in subsection (l) of this section), for the last 5 years of which the salary deductions provided for by subsection (c) of this section or the deposits required by subsection (d) of this section have actually been made (and not withdrawn) or the salary deductions required by the civil service retirement laws have actually been made (and not withdrawn)—

["(A) if the judge is survived by a surviving spouse but not by a dependent child, there shall be paid to the surviving spouse an annuity beginning with the day of the death of the judge or following the surviving spouse's attainment of the age of 50 years, whichever is the later, in an amount computed as provided in subsection (k) of this section; or

[“(B) if the judge is survived by a surviving spouse and a dependent child or children, there shall be paid to the surviving spouse an immediate annuity in an amount computed as provided in subsection (k) of this section and there shall also be paid to or on behalf of each such child an immediate annuity equal to the lesser of—

[“(i) 10 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

[“(ii) 20 percent of such average annual pay, divided by the number of such children; or

[“(C) if the judge is not survived by a surviving spouse but is survived by a dependent child or children, there shall be paid to or on behalf of each such child an immediate annuity equal to the lesser of—

[“(i) 20 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

[“(ii) 40 percent of such average annual pay, divided by the number of such children.

[“(2) The annuity payable to a surviving spouse under this subsection shall be terminated—

[“(A) upon the surviving spouse's death; or

[“(B) upon the remarriage of the surviving spouse before age 55.

[“(3) The annuity payable to a child under this subsection shall be terminated upon the child's death.

[“(4) In case of the death of a surviving spouse of a judge leaving a dependent child or children of the judge surviving the spouse, the annuity of such child or children under paragraph (1)(B) of this subsection shall be recomputed and paid as provided in paragraph (1)(C) of this subsection. In any case in which the annuity of a dependent child is terminated, the annuities of any remaining dependent child or children, based upon the service of the same judge, shall be recomputed and paid as though the child whose annuity was so terminated had not survived the judge.

[“(g) Questions of family relationships, dependency, and disability arising under this section shall be determined in the same manner as such questions arising under chapter 84 of title 5 are determined.

[“(h)(1) If—

[“(A) a judge making an election under subsection (b) of this section dies while in office (i) before having rendered 5 years of civilian service computed as prescribed in subsection (l) of this section, or (ii) after having rendered 5 years of such civilian service but without a survivor entitled to annuity benefits provided by subsection (f) of this section; or

[“(B) the right of all persons entitled to an annuity under subsection (f) of this section based on the service of such judge terminates before a claim for such benefits has been established,

the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year, to the date of the death of such judge) shall be paid in the manner specified in paragraph (2) of this subsection.

[“(2) An amount payable under paragraph (1) of this subsection shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date title to the payment arises, in the following order of precedence:

[“(A) To the beneficiary or beneficiaries whom the judge designated in writing filed before death with the chief judge (except that in the case of the chief judge such designation shall be filed before death as prescribed by the Court).

[“(B) To the surviving spouse of the judge.

[“(C) To the child or children of the judge (and the descendants of any deceased children by representation).

[“(D) To the parents of the judge or the survivor of them.

[“(E) To the executor or administrator of the estate of the judge.

[“(F) To such other next of kin of the judge as may be determined by the chief judge to be entitled under the laws of the domicile of the judge at the time of the judge's death.

[“(3) Determination as to the surviving spouse, child, or parent of a judge for the purposes of paragraph (2) of this subsection shall be made without regard to the definitions in subsection (a) of this section.

[“(4) Payment under this subsection in the manner provided in this subsection shall be a bar to recovery by any other person.

[“(5) In a case in which the annuities of all persons entitled to annuity based upon the service of a judge terminate before the aggregate amount of annuity paid equals the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year to the date of the death of the judge), the difference shall be paid, upon establishment of a valid claim therefor, in the order of precedence prescribed in paragraph (2) of this subsection.

["(6) Any accrued annuity remaining unpaid upon the termination (other than by death) of the annuity of any individual based upon the service of a judge shall be paid to that individual. Any accrued annuity remaining unpaid upon the death of an individual receiving an annuity based upon the service of a judge shall be paid, upon the establishment of a valid claim therefor, in the following order of precedence:

["(A) To the executor or administrator of the estate of that person.

["(B) After 30 days after the date of the death of such individual, to such individual or individuals as may appear in the judgment of the chief judge to be legally entitled thereto.

Such payment shall be a bar to recovery by any other individual.

["(i) When a payment under this section is to be made to a minor, or to a person mentally incompetent or under other legal disability adjudged by a court of competent jurisdiction, the payment may be made to the person who is constituted guardian or other fiduciary by the law of the State of residence of such claimant or is otherwise legally vested with the care of the claimant or the claimant's estate. If no guardian or other fiduciary of the person under legal disability has been appointed under the laws of the State of residence of the claimant, the chief judge shall determine the person who is otherwise legally vested with the care of the claimant or the claimant's estate.

["(j) Annuities under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity has accrued. An annuity under this section is not assignable, either in law or in equity, or subject to execution, levy, attachment, garnishment, or other legal process.

["(k)(1) The annuity of the surviving spouse of a judge making an election under subsection (b) of this section shall be an amount equal to the sum of the following:

["(A) The product of—

["(i) 1.5 percent of the judge's average annual pay; and

["(ii) the sum of the judge's years of judicial service, the judge's years of prior allowable service as a Member of Congress, the judge's years of prior allowable service performed as a member of the Armed Forces, and the judge's years, not exceeding 15, of prior allowable service performed as a congressional employee (as defined in section 2107 of title 5).

["(B) Three-fourths of 1 percent of the judge's average annual pay multiplied by the judge's years of allowable service not counted under subparagraph (A) of this paragraph.

["(2) An annuity computed under this subsection may not exceed 50 percent of the judge's average annual pay and may not be less than 25 percent of such average annual pay. Such annuity shall be further reduced in accordance with subsection (d) of this section (if applicable).

["(3) For purposes of this subsection, the term 'average annual pay', with respect to a judge, means the average annual pay received by the judge for judicial service (including periods in which the judge received retired pay under section 4096(d) of this title) or for any other prior allowable service during the period of 3 consecutive years in which the judge received the largest such average annual pay.

["(l) Subject to subsection (d) of this section, the years of service of a judge which are allowable as the basis for calculating the amount of the annuity of the judge's surviving spouse shall include the judge's years of service as a judge of the Court, the judge's years of service as a Member of Congress, the judge's years of active service as a member of the Armed Forces not exceeding 5 years in the aggregate and not including any such service for which credit is allowed for the purposes of retirement or retired pay under any other provision of law, and the judge's years of any other civilian service within the purview of section 8332 of title 5.

["(m) Nothing contained in this section shall be construed to prevent a surviving spouse eligible therefor from simultaneously receiving an annuity under this section and any annuity to which such spouse would otherwise be entitled under any other law without regard to this section, but in computing such other annuity service used in the computation of such spouse's annuity under this section shall not be credited.

["(n) A judge making an election under subsection (b) of this section shall, at the time of such election, waive all benefits under the civil service retirement laws. Such a waiver shall be made in the same manner and shall have the same force and effect as an election filed under section 4096(d) of this title.

[“(o) Whenever the salaries of judges paid under section 4053(e) of this title are increased, each annuity payable from the retirement fund which is based, in whole or in part, upon a deceased judge having rendered some portion of that judge's final 18 months of service as a judge of the Court, shall also be increased. The amount of the increase in the annuity shall be determined by multiplying the amount of the annuity on the date on which the increase in salaries becomes effective by 3 percent for each full 5 percent by which those salaries were increased.

[“§ 4098. Court of Veterans Appeals Retirement Fund

[“(a) There is established in the Treasury a fund known as the Court of Veterans Appeals Retirement Fund.

[“(b) Amounts in the fund are available for the payment of judges' retired pay under section 4096 of this title and of annuities, refunds, and allowances under section 4097 of this title.

[“(c) Amount deposited by or deducted and withheld from the salary of a judge under section 4096 or 4097 of this title shall be deposited in the fund and credited to an individual account of the judge.

[“(d) The chief judge of the Court of Veterans Appeals shall submit to the President an annual estimate of the expenditures and appropriations necessary for the maintenance and operation of the fund, and such supplemental and deficiency estimates as may be required from time to time for the same purposes, according to law.

[“(e)(1) The chief judge may cause periodic examinations of the retirement fund to be made by an actuary, who may be an actuary employed by another department of the Government temporarily assigned for the purpose.

[“(2)(A) Subject to the availability of appropriations, there shall be deposited in the Treasury to the credit of the retirement fund, not later than the close of each fiscal year, such amounts as may be required to reduce to zero the unfunded liability (if any) of the fund. Such deposits shall be taken from sums available for that fiscal year for the payment of the expenses of the Court.

[“(B) For purposes of subparagraph (A) of this paragraph, the term ‘unfunded liability’, with respect to any fiscal year, means the amount estimated by the chief judge to be equal to the excess (as of the close of that fiscal year) of—

[“(i) the present value of all benefits payable from the fund (determined on an annual basis in accordance with section 9503 of title 31), over

[“(ii) the sum of—

[“(I) the present values of future deductions under sections 4096(i) and 4097(c) of this title and future deposits under sections 4096(j) and 4096(d) of this title, and

[“(II) the balance in the fund as of the close of the fiscal year.

[“(C) Amounts deposited in the retirement fund under this paragraph shall not be credited to the account of any individual.

[“(f) The Secretary of the Treasury shall invest from time to time, in interest-bearing securities of the United States, such portions of the retirement fund as in such Secretary's judgment may not be immediately required for payments from the fund. The income derived from such investments shall constitute a part of the fund.”.

[(b) Clerical Amendment.—The table of sections at the beginning of chapter 72 of such title is amended by adding at the end the following:

[“SUBCHAPTER V—RETIREMENT AND SURVIVORS ANNUITIES

[“4096. Retirement of judges.
[“4097. Survivor annuities.
[“4098. Court of Veterans Appeals Retirement Fund.”.

[SEC. 102. CONFORMING AMENDMENTS.

[(a) Civil Service Retirement System.—Section 8334(i) of title 5, United States Code, is amended by adding at the end the following new paragraph:

[“(5) Notwithstanding any other provision of law, a judge who is covered by section 4096 of title 38 shall not be subject to deductions and contributions to the Fund, if the judge notifies the Director of the Office of Personnel Management of an election of a retirement annuity under that section. Upon such an election, the judge shall be entitled to a lump-sum credit under section 8342(a) of this title.”.

[(b) Federal Employees Retirement System.—Section 8402 of title 5, United States Code, is amended by adding at the end the following new subsection:

[“(e) A judge who is covered by section 4096 of title 38 shall be excluded from the operation of this chapter if the judge notifies the Director of the Office of Personnel

Management of an election of a retirement annuity under that section. Upon such election, the judge shall be entitled to a lump-sum credit under section 8424 of this title.".

[(c) STANDARDS FOR REMOVAL OF JUDGES.—Section 4053(f)(1) of title 38, United States Code, is amended in the first sentence—

[(1) by inserting "or" before "engaging"; and

[(2) by striking out "law," all that follows in that sentence and inserting in lieu thereof "law.".

[TITLE II—PROVISIONS RELATING TO ESTABLISHMENT OF COURT OF VETERANS APPEALS

[SEC. 201. INITIAL FUNDING FOR COURT.

[(a) TRANSFERS FROM DEPARTMENT OF VETERANS AFFAIRS FUNDS.—The Secretary of Veterans Affairs shall transfer to the United States Court of Veterans Appeals such funds as the Chief Judge of the Court certifies to be required, not to exceed $3,100,000, for the initial startup costs and operation of the Court until funds for the operation of the Court are first appropriated. Such funds shall be derived in equal amounts, or in such other amounts as the Secretary may determine, from the following revolving funds: the Canteen Service Revolving Fund, the Loan Guaranty Revolving Fund, and the Direct Loan Revolving Fund.

[(b) REIMBURSEMENT.—Upon the appropriation of funds for the operation of the Court, the Chief Judge of the Court shall immediately transfer to the Secretary of Veterans Affairs, for reimbursement to the appropriate revolving funds, the total sum transferred to the Court under subsection (a).

[SEC. 202. FACILITIES FOR COURT.

[If the Administrator of General Services, through a long-term lease arrangement with the Postal Service, acquires the right to operate the space in the Post Office Building adjacent to Union Station in the District of Columbia, the Administrator—

[(1) shall provide for approximately 30,000 square feet of such space on the first floor of that building (or in such other area in that building and on the first floor as the chief judge of the Court may specify) to be remodeled for, and to be leased to, the United States Court of Veterans Appeals for use as the Court's principal place of business; and

[(2) shall arrange that space adjacent to such 30,000 square feet be leased under such terms and conditions that, with proper notice, it can be made available for the Court in the event of the need for expansion.

[SEC. 203. INTERIM PROVISION FOR FILING NOTICES OF APPEAL.

[In the case of a person adversely affected by a final decision of the Board of Veterans' Appeals that is made before the date on which the United States Court of Veterans Appeals has caused to be published in the Federal Register a notice by the Court that it has commenced operations, the period prescribed under section 4066 of title 38, United States Code, within which a notice of appeal must be filed with the Court shall be extended to the end of the 30-day period beginning on the date such notice is published, if the end of that period is later than the date that would otherwise be applicable under such section.

[SEC. 204. INITIAL RULES OF THE COURT.

[The Federal Rules of Appellate Procedure (28 U.S.C. App.) shall be the rules of the United States Court of Veterans Appeals until otherwise provided by the Court in accordance with section 4064(a) of title 38, United States Code.

[SEC. 205. INTERIM AUTHORITY TO EMPLOY PERSONNEL.

[(a) EMPLOYMENT AUTHORITY.—During the period beginning on the date of the enactment of this Act and ending on December 31, 1989, the United States Court of Veterans Appeals may employ under this section not to exceed 35 employees (and employees to replace any employees so appointed whose appointment by the Court is terminated). Any employee so appointed shall be eligible for noncompetitive conversion to a position in the competitive service if—

[(1) application for such conversion is made to the Director of the Office of Personnel Management not later than December 31, 1990; and

[(2) the Director of the Office of Personnel Management determines that such noncompetitive conversion is in the interest of the Government.

[(b) PREFERENCE ELIGIBLES.—In the making of appointments pursuant to subsection (a), the Court shall give preference, among equally qualified persons, to persons who are preference eligibles (as defined in section 2108(3) of title 5, United States Code).

[(c) WAIVERS.—Appointments may be made under subsection (a) without regard to the provisions of title 5, United States Code, governing appointments in the competitive service and without regard to section 4081 of title 38, United States Code.

[(d) INTERIM AUTHORITY OF CHIEF JUDGE OF THE COURT.—The authority provided in subsection (a) may be exercised by the chief judge of the Court whenever there are not at least 2 associate judges of the Court.

[TITLE III—TECHNICAL CORRECTIONS

[SEC. 301. EFFECTIVE DATE FOR NEW RULE FOR REOPENING BOARD OF VETERANS' APPEALS DISALLOWED CASES.

[Section 401(d) of the Veterans' Judicial Review Act (Public Law 100-687; 102 Stat. 4122) is amended to read as follows:

["(d) BOARD OF VETERANS' APPEALS.—Sections 202, 203, 205, 206, and 207 shall take effect as of January 1, 1989. Section 204 shall take effect on September 1, 1989.".

[SEC. 302. OTHER TECHNICAL AMENDMENTS.

[(a) CROSS-REFERENCE TO NEW SECTION.—Section 3301(b)(1) of title 38, United States Code, is amended by striking out "section 4009" and inserting in lieu thereof "section 3009 or 4009".

[(b) REVIEW OF COURT DECISIONS.—Section 4092(d)(1) of such title is amended by striking out "statute or".

[(c) APPLICABILITY OF AMENDMENTS.—The amendments made by subsections (a) and (b) shall take effect as if included in the Veterans' Judicial Review Act.

[(d) REDESIGNATION OF DUPLICATE SECTION NUMBER.—(1) The section 223 of title 38, United States Code, added by section 203(b)(1) of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; 102 Stat. 509) is redesignated as section 224.

[(2) The item relating to that section in the table of sections at the beginning of chapter 3 of that title is revised to reflect the redesignation made by paragraph (1).

[TITLE IV—MISCELLANEOUS PROVISIONS

[SEC. 401. NONCAREER APPOINTMENTS IN DEPARTMENT OF VETERANS AFFAIRS.

[Section 12(c)(2) of the Department of Veterans Affairs Act (Public Law 100-527; 102 Stat. 2642) is amended—

[(1) by inserting "(A)" before "any person"; and

[(2) by inserting before the period at the end the following: ", or (B) any person to (i) a Senior Executive Service position as a noncareer appointee, or (ii) a position which is excepted from the competitive service, on a temporary or permanent basis, because of the confidential or policy-determining character of the position".

[SEC. 402. ACTING CHIEF JUDGE IN EVENT OF VACANCY.

[Section 4054 of title 38, United States Code, is amended by adding at the end the following new subsection:

["(d) In the event of a vacancy in the position of chief judge of the Court, the associate judge senior in service on the Court shall serve as acting chief judge unless the President designates one of the other associate judges to serve as acting chief judge, in which case the judge so designated shall serve as acting chief judge.".

[SEC. 403. AUTHORITY TO PROCURE SERVICES OF EXPERTS AND CONSULTANTS.

[(a) AUTHORITY.—Section 4081 of title 38, United States Code, is amended—

[(1) by inserting "(a)" before "The Court"; and

[(2) by adding at the end the following new subsection:

["(b) The Court may procure the services of experts and consultants under section 3109 of title 5.".

[(b) EFFECTIVE DATE.—Notwithstanding section 401 of the Veterans' Judicial Review Act, the authority provided by subsection (b) of section 4081 of title 38, United States Code, as added by subsection (a), shall take effect on the date of the enactment of this Act.

and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Court of Veterans Appeals Judges Retirement Act".

TITLE I—JUDGES RETIREMENT AND SURVIVOR ANNUITY PROGRAM

SEC. 101. JUDGES RETIREMENT PROGRAM.

(a) Retirement System.—Chapter 72 of title 38, United States Code, is amended by adding at the end the following new subchapter:

"SUBCHAPTER V—RETIREMENT AND SURVIVORS ANNUITIES

"§ 4096. Retirement of judges

"(a) For purposes of this section:

"(1) The term 'Court' means the United States Court of Veterans Appeals.

"(2) The term 'judge' means the chief judge or an associate judge of the Court.

"(b)(1) A judge who meets the age and service requirements set forth in the following table may retire:

"The judge has attained age:	And the years of service as a judge are at least
65	15
66	14
67	13
68	12
69	11
70	10

"(2) A judge who is not reappointed following the expiration of the term for which appointed may retire upon the completion of that term if the judge has served as a judge of the Court for 15 years or more. In order to retire under this paragraph, a judge must, not earlier than 9 months preceding the date of the expiration of the judge's term of office and not later than 6 months preceding such date, advise the President in writing that the judge is willing to accept reappointment to the Court.

"(3) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall retire.

"(c)(1) An individual who retires under subsection (b) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall (except as provided in paragraph (2) of this subsection) receive retired pay at the rate of pay in effect at the time of retirement.

"(2) An individual who serves as a judge for less than 10 years and who retires under subsection (b)(3) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall receive retired pay at a rate equal to one-half of the rate of pay in effect at the time of retirement.

"(3) Retired pay under this subsection shall begin to accrue on the day following the day on which the individual's salary as judge ceases to accrue and shall continue to accrue during the remainder of the individual's life. Retired pay under this subsection shall be paid in the same manner as the salary of a judge.

"(d)(1) A judge may elect to receive retired pay under subsection (c) of this section. Such an election—

"(A) may be made only while an individual is a judge (except that, in the case of an individual who fails to be reappointed as judge at the expiration of a term of office, the election may be made at any time before the date after the day on which the individual's successor takes office); and

"(B) may not be revoked after the retired pay begins to accrue.

"(2) In the case of a judge other than the chief judge, such an election shall be made by filing notice of the election in writing with the chief judge. In the case of the chief judge, such an election shall be made by filing notice of the election in writing with the Director of the Office of Personnel Management.

"(3) The chief judge shall transmit to the Director of the Office of Personnel Management a copy of each notice filed with the chief judge under this subsection.

"(e) If an individual for whom an election to receive retired pay under subsection (c) is in effect accepts compensation for employment with the United States, the individual shall, to the extent of the amount of that compensation, forfeit all rights to retired pay under subsection (c) of this section for the period for which the compensation is received.

"(f)(1) Except as otherwise provided in this subsection, the provisions of the civil service retirement laws (including the provisions relating to the deduction and withholding of amounts from basic pay, salary, and compensation) shall apply with respect to service as a judge as if this section had not been enacted.

"(2) In the case of any individual who has filed an election to receive retired pay under subsection (c) of this section—

"(A) no annuity or other payment shall be payable to any person under the civil service retirement laws with respect to any service performed by such individual (whether performed before or after such election is filed and whether performed as judge or otherwise);

"(B) no deduction for purposes of the Civil Service Retirement and Disability Fund shall be made from retired pay payable to that individual under subsection (c) of this section or from any other salary, pay, or compensation payable to that individual, for any period beginning after the day on which such election is filed; and

"(C) such individual shall be paid the lump-sum credit computed under section 8331(8) or 8401(a)(19) of title 5, or whichever applies, upon making application therefor with the Office of Personnel Management.

"(g)(1) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall certify to the President in writing that such permanent disability exists. If the chief judge retires for such a disability, the retirement of the chief judge shall not take effect until concurred in by the President. If any other judge retires for such a disability, the chief judge shall furnish to the President a certificate of disability signed by the chief judge.

"(2) Whenever the President finds that a judge has become permanently disabled and as a result of that disability is unable to perform the duties of the office, the President shall declare that judge to be retired. Before a judge may be retired under this paragraph, the judge shall be provided with a full specification of the reasons for the retirement and an opportunity to be heard.

"(h)(1) An individual who has filed an election to receive retired pay under subsection (c) of this section may revoke such election at any time before the first day on which retired pay would (but for such revocation) begin to accrue with respect to such individual.

"(2) Any revocation under this subsection shall be made by filing a notice of the election in writing with the Director of the Office of Personnel Management. The Office of Personnel Management shall transmit to the chief judge a copy of each notice filed under this subsection.

"(3) In the case of a revocation under this subsection—

"(A) for purposes of this section, the individual shall be treated as not having filed an election to receive retired pay under subsection (c) of this section;

"(B) for purposes of section 4097 of this title—

"(i) the individual shall be treated as not having filed an election under section 4097(b) of this title, and

"(ii) section 4097(e) of this title shall not apply and the amount credited to such individual's account (together with interest at 3 percent per year, compounded on December 31 of each year to the date on which the revocation is filed) shall be returned to the individual;

"(C) no credit shall be allowed for any service as a judge of the Court unless with respect to such service either there has been deducted and withheld the amount required by the civil service retirement laws or there has been deposited in the Civil Service Retirement and Disability Fund an amount equal to the amount so required, with interest;

"(D) the Court shall deposit in the Civil Service Retirement and Disability Fund an amount equal to the additional amount it would have contributed to such Fund but for the election under subsection (d); and

"(E) if subparagraphs (C) and (D) of this paragraph are complied with, service on the Court shall be treated as service with respect to which deductions and contributions had been made during the period of service.

"(i)(1) Beginning with the next pay period after the Director of the Office of Personnel Management receives a notice under subsection (d) of this section that a judge has elected to receive retired pay under this section, the Director shall deduct and withhold 1 percent of the salary of such judge. Amounts shall be so deducted and withheld in a manner determined by the Director. Amounts deducted and withheld under this subsection shall be deposited in the Treasury of the United States to the credit of the Court of Veterans Appeals Judges Retirement Fund. Deductions under this subsection from the salary of a judge shall terminate upon the retirement of the judge or upon the completion of 15 years of service for which either deductions under this subsection or a deposit under subsection (j) of this section has been made, whichever occurs first.

"(2) Each judge who makes an election under subsection (d) of this section shall be considered to agree to the deductions from salary which are made under paragraph (1) of this subsection.

"(j) A judge who makes an election under subsection (d) of this section shall deposit, for service on the Court performed before the election for which contributions may be made under this section, an amount equal to 1 percent of the salary received for the first years, not exceeding 15 years, of that service. Retired pay may not be allowed until a deposit required by this subsection has been made.

"(k) The amounts deducted and withheld under subsection (i) of this section, and the amounts deposited under subsection (j) of this section, shall be deposited in the Court of Veterans Appeals Retirement Fund for credit to individual accounts in the name of each judge from whom such amounts are received.

"§ 4097. Survivor annuities

"(a) For purposes of this section:

"(1) The term 'Court' means the United States Court of Veterans Appeals.

"(2) The term 'judge' means the chief judge or an associate judge of the Court.

"(3) The term 'pay' means salary received under section 4053(e) of this title and retired pay received under section 4096(c) of this title.

"(4) The term 'retirement fund' means the Court of Veterans Appeals Retirement Fund established under section 4098 of this title.

"(5) The term 'surviving spouse' means a surviving spouse of an individual who (A) was married to such individual for at least 2 years immediately preceding the individual's death, or (B) is a parent of issue by the marriage.

"(6) The term 'dependent child' has the meaning given the term 'child' in section 376(a)(5) of title 28.

"(7) The term 'Member of Congress' means a Representative, a Senator, a Delegate to Congress, or the Resident Commissioner of Puerto Rico.

"(b) A judge may become a participant in the annuity program under this section by filing a written election under this subsection while in office. Any such election shall be made in such manner as may be prescribed by the Court.

"(c) There shall be deducted and withheld each pay period from the pay of a judge who has made an election under subsection (b) of this section a sum equal to 3.5 percent of the judge's pay. Amounts so deducted and withheld shall be deposited in the retirement fund. A judge who makes an election under subsection (b) of this section shall be considered by that election to agree to the deductions from the judge's pay required by this subsection.

"(d) A judge who makes an election under subsection (b) of this section shall deposit, with interest at 3 percent per year compounded on December 31 of each year, to the credit of the retirement fund, an amount equal to 3.5 percent of the judge's pay and of the judge's basic salary, pay, or compensation for service as a Member of Congress, and for any other civilian service within the purview of section 8332 of title 5. Each such judge may elect to make such deposits in installments during the judge's period of service in such amount and under such conditions as may be determined in each instance by the chief judge. Notwithstanding the failure of a judge to make such deposit, credit shall be allowed for the service rendered, but the annual annuity of the surviving spouse of such judge shall be reduced by an amount equal to 10 percent of the amount of such deposit, computed as of the date of the death of such judge, unless the surviving spouse elects to eliminate such service entirely from credit under subsection (k) of this section. However, a deposit shall not be required from a judge for any year with respect to which deductions from the judge's pay, or a deposit, were actually made (and not withdrawn) under the civil service retirement laws.

"(e) If the service of a judge who makes an election under subsection (b) of this section terminates other than pursuant to the provisions of section 4096 of this title, or if any judge ceases to be married after making the election under subsection (b) of this section and revokes (in a writing filed as provided in subsection (b) of this section) such election, the amount credited to the judge's individual account (together with interest at 3 percent per year compounded on December 31 of each year to the date of the judge's relinquishment of office) shall be returned to the judge. For the purpose of this section, the service of a judge making an election under subsection (b) of this section shall be considered to have terminated pursuant to section 4096 of this title if—

"(1) the judge is not reappointed following expiration of the term for which appointed; and

"(2) at or before the time of the expiration of that term, the judge is eligible for and elects to receive retired pay under section 4096 of this title.

"(f)(1) If a judge who makes an election under subsection (b) of this section dies after having rendered at least 5 years of civilian service (computed as prescribed in subsection (l) of this section), for the last 5 years of which the salary deductions provided for by subsection (c) of this section or the deposits required by subsection (d) of this section have actually been made (and not withdrawn) or the salary deductions required by the civil service retirement laws have actually been made (and not withdrawn)—

"(A) if the judge is survived by a surviving spouse but not by a dependent child, there shall be paid to the surviving spouse an annuity beginning with the day of the death of the judge or following the surviving spouse's attainment of the age of 50 years, whichever is the later, in an amount computed as provided in subsection (k) of this section; or

"(B) if the judge is survived by a surviving spouse and a dependent child or children, there shall be paid to the surviving spouse an immediate annuity in an amount computed as provided in subsection (k) of this section and there shall also be paid to or on behalf of each such child an immediate annuity equal to the lesser of—

"(i) 10 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

"(ii) 20 percent of such average annual pay, divided by the number of such children; or

"(C) if the judge is not survived by a surviving spouse but is survived by a dependent child or children, there shall be paid to or on behalf of each such child an immediate annuity equal to the lesser of—

"(i) 20 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

"(ii) 40 percent of such average annual pay, divided by the number of such children.

"(2) The annuity payable to a surviving spouse under this subsection shall be terminated—

"(A) upon the surviving spouse's death; or

"(B) upon the remarriage of the surviving spouse before age 55.

"(3) The annuity payable to a child under this subsection shall be terminated upon the child's death.

"(4) In case of the death of a surviving spouse of a judge leaving a dependent child or children of the judge surviving the spouse, the annuity of such child or children under paragraph (1)(B) of this subsection shall be recomputed and paid as provided in paragraph (1)(C) of this subsection. In any case in which the annuity of a dependent child is terminated, the annuities of any remaining dependent child or children, based upon the service of the same judge, shall be recomputed and paid as though the child whose annuity was so terminated had not survived the judge.

"(g) Questions of family relationships, dependency, and disability arising under this section shall be determined in the same manner as such questions arising under chapter 84 of title 5 are determined.

"(h)(1) If—

"(A) a judge making an election under subsection (b) of this section dies while in office (i) before having rendered 5 years of civilian service computed as prescribed in subsection (l) of this section, or (ii) after having rendered 5 years of such civilian service but without a survivor entitled to annuity benefits provided by subsection (f) of this section; or

"(B) the right of all persons entitled to an annuity under subsection (f) of this section based on the service of such judge terminates before a claim for such benefits has been established,

the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year, to the date of the death of such judge) shall be paid in the manner specified in paragraph (2) of this subsection.

"(2) An amount payable under paragraph (1) of this subsection shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date title to the payment arises, in the following order of precedence:

"(A) To the beneficiary or beneficiaries whom the judge designated in writing filed before death with the chief judge (except that in the case of the chief judge such designation shall be filed before death as prescribed by the Court).

"(B) To the surviving spouse of the judge.

"(C) To the child or children of the judge (and the descendants of any deceased children by representation).

"(D) To the parents of the judge or the survivor of them.

"(E) To the executor or administrator of the estate of the judge.

"(F) To such other next of kin of the judge as may be determined by the chief judge to be entitled under the laws of the domicile of the judge at the time of the judge's death.

"(3) Determination as to the surviving spouse, child, or parent of a judge for the purposes of paragraph (2) of this subsection shall be made without regard to the definitions in subsection (a) of this section.

"(4) Payment under this subsection in the manner provided in this subsection shall be a bar to recovery by any other person.

"(5) In a case in which the annuities of all persons entitled to annuity based upon the service of a judge terminate before the aggregate amount of annuity paid equals the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year to the date of the death of the judge), the difference shall be paid, upon establishment of a valid claim therefor, in the order of precedence prescribed in paragraph (2) of this subsection.

"(6) Any accrued annuity remaining unpaid upon the termination (other than by death) of the annuity of any individual based upon the service of a judge shall be paid to that individual. Any accrued annuity remaining unpaid upon the death of an individual receiving an annuity based upon the service of a judge shall be paid, upon the establishment of a valid claim therefor, in the following order of precedence:

"(A) To the executor or administrator of the estate of that person.

"(B) After 30 days after the date of the death of such individual, to such individual or individuals as may appear in the judgment of the chief judge to be legally entitled thereto.

Such payment shall be a bar to recovery by any other individual.

"(i) When a payment under this section is to be made to a minor, or to a person mentally incompetent or under other legal disability adjudged by a court of competent jurisdiction, the payment may be made to the person who is constituted guardian or other fiduciary by the law of the State of residence of such claimant or is otherwise legally vested with the care of the claimant or the claimant's estate. If no guardian or other fiduciary of the person under legal disability has been appointed under the laws of the State of residence of the claimant, the chief judge shall determine the person who is otherwise legally vested with the care of the claimant or the claimant's estate.

"(j) Annuities under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity has accrued. An annuity under this section is not assignable, either in law or in equity, or subject to execution, levy, attachment, garnishment, or other legal process.

"(k)(1) The annuity of the surviving spouse of a judge making an election under subsection (b) of this section shall be an amount equal to the sum of the following:

"(A) The product of—

"(i) 1.5 percent of the judge's average annual pay; and

"(ii) the sum of the judge's years of judicial service, the judge's years of prior allowable service as a Member of Congress, the judge's years of prior allowable service performed as a member of the Armed Forces, and the judge's years, not exceeding 15, of prior allowable service performed as a congressional employee (as defined in section 2107 of title 5).

"(B) Three-fourths of 1 percent of the judge's average annual pay multiplied by the judge's years of allowable service not counted under subparagraph (A) of this paragraph.

"(2) An annuity computed under this subsection may not exceed 50 percent of the judge's average annual pay and may not be less than 25 percent of such average annual pay. Such annuity shall be further reduced in accordance with subsection (d) of this section (if applicable).

"(3) For purposes of this subsection, the term 'average annual pay', with respect to a judge, means the average annual pay received by the judge for judicial service (including periods in which the judge received retired pay under section 4096(d) of this title) or for any other prior allowable service during the period of 3 consecutive years in which the judge received the largest such average annual pay.

"(l) Subject to subsection (d) of this section, the years of service of a judge which are allowable as the basis for calculating the amount of the annuity of the judge's surviving spouse shall include the judge's years of service as a judge of the Court, the judge's years of service as a Member of Congress, the judge's years of active service as a member of the Armed Forces not exceeding 5 years in the aggregate and not including any such service for which credit is allowed for the purposes of retirement or retired pay under any other provision of law, and the judge's years of any other civilian service within the purview of section 8332 of title 5.

"(m) Nothing contained in this section shall be construed to prevent a surviving spouse eligible therefor from simultaneously receiving an annuity under this section and any annuity to which such spouse would otherwise be entitled under any other law without regard to this section, but in computing such other annuity service used in the computation of such spouse's annuity under this section shall not be credited.

"(n) A judge making an election under subsection (b) of this section shall, at the time of such election, waive all benefits under the civil service retirement laws. Such a waiver shall be made in the same manner and shall have the same force and effect as an election filed under section 4096(d) of this title.

"(o) Whenever the salaries of judges paid under section 4053(e) of this title are increased, each annuity payable from the retirement fund which is based, in whole or in part, upon a deceased judge having rendered some portion of that judge's final 18 months of service as a judge of the Court, shall also be increased. The amount of the increase in the annuity shall be determined by multiplying the amount of the annuity on the date on which the increase in salaries becomes effective by 3 percent for each full 5 percent by which those salaries were increased.

"§ 4098. Court of Veterans Appeals Retirement Fund

"(a) There is established in the Treasury a fund known as the Court of Veterans Appeals Retirement Fund.

"(b) Amounts in the fund are available for the payment of judges' retired pay under section 4096 of this title and of annuities, refunds, and allowances under section 4097 of this title.

"(c) Amounts deposited by, or deducted and withheld from the salary and retired pay of, a judge under section 4096 or 4097 of this title shall be deposited in the fund and credited to an individual account of the judge.

"(d) The chief judge of the Court of Veterans Appeals shall submit to the President an annual estimate of the expenditures and appropriations necessary for the maintenance and operation of the fund, and such supplemental and deficiency estimates as may be required from time to time for the same purposes, according to law.

"(e)(1) The chief judge may cause periodic examinations of the retirement fund to be made by an actuary, who may be an actuary employed by another department of the Government temporarily assigned for the purpose.

"(2)(A) Subject to the availability of appropriations, there shall be deposited in the Treasury to the credit of the retirement fund, not later than the close of each fiscal year, such amounts as may be required to reduce to zero the unfunded liability (if any) of the fund. Such deposits shall be taken from sums available for that fiscal year for the payment of the expenses of the Court.

"(B) For purposes of subparagraph (A) of this paragraph, the term 'unfunded liability', with respect to any fiscal year, means the amount estimated by the chief judge to be equal to the excess (as of the close of that fiscal year) of—

"(i) the present value of all benefits payable from the fund (determined on an annual basis in accordance with section 9503 of title 31), over

"(ii) the sum of—

"(I) the present values of future deductions under sections 4096(i) and 4097(c) of this title and future deposits under sections 4096(j) and 4096(d) of this title, and

"(II) the balance in the fund as of the close of the fiscal year.

"(C) Amounts deposited in the retirement fund under this paragraph shall not be credited to the account of any individual.

"(f) The Secretary of the Treasury shall invest from time to time, in interest-bearing securities of the United States, such portions of the retirement fund as in such Secretary's judgment may not be immediately required for payments from the fund. The income derived from such investments shall constitute a part of the fund.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 72 of such title is amended by adding at the end the following:

"SUBCHAPTER V—RETIREMENT AND SURVIVORS ANNUITIES

"4096. Retirement of judges.
"4097. Survivor annuities.
"4098. Court of Veterans Appeals Retirement Fund.".

SEC. 102. CONFORMING AMENDMENTS.

(a) Civil Service Retirement System.—Section 8334(i) of title 5, United States Code, is amended by adding at the end the following new paragraph:

"(5) Notwithstanding any other provision of law, a judge who is covered by section 4096 of title 38 shall not be subject to deductions and contributions to the Fund, if the judge notifies the Director of the Office of Personnel Management of an election of a retirement annuity under that section. Upon such an election, the judge shall be entitled to a lump-sum credit under section 8342(a) of this title.".

(b) Federal Employees Retirement System.—Section 8402 of title 5, United States Code, is amended by adding at the end the following new subsection:

"(f) A judge who is covered by section 4096 of title 38 shall be excluded from the operation of this chapter if the judge notifies the Director of the Office of Personnel Management of an election of a retirement annuity under that section. Upon such election, the judge shall be entitled to a lump-sum credit under section 8424 of this title.".

(c) Standards for Removal of Judges.—Section 4053(f)(1) of title 38, United States Code, is amended in the first sentence—

(1) by inserting "or" before "engaging"; and

(2) by striking out "law," all that follows in that sentence and inserting in lieu thereof "law.".

TITLE II—PROVISIONS RELATING TO ESTABLISHMENT OF COURT OF VETERANS APPEALS

SEC. 201. FACILITIES FOR THE COURT.

(a) Space in the District of Columbia.—The Administrator of General Services shall provide suitable building space in the District of Columbia for the United States Court of Veterans Appeals as the Court's principal place of business. The Administrator shall, if necessary, arrange for temporary space for the Court if permanent space is not immediately available for the Court. The Administrator shall place a high priority on the provision of such temporary and permanent space for the Court.

(b) Approval by Court.—Any space to be provided for the Court of Veterans Appeals under subsection (a) must be acceptable to the Court.

(c) Additional Requirement.—Any building space provided to the Court under subsection (a) shall be adjacent to additional building space (in an amount acceptable to the Court) that can be made available to the Court in the future if needed for expansion of the facilities of the Court.

SEC. 202. INTERIM PROVISION FOR FILING NOTICES OF APPEAL.

In the case of a person adversely affected by a final decision of the Board of Veterans' Appeals that is made before the date on which the United States Court of Veterans Appeals has caused to be published in the Federal Register a notice by the Court that it has commenced operations, the period prescribed under section 4066 of title 38, United States Code, within which a notice of appeal must be filed with the Court shall be extended to the end of the 30-day period beginning on the date such notice is published, if the end of that period is later than the date that would otherwise be applicable under such section.

SEC. 203. INTERIM RULES OF THE COURT.

The Federal Rules of Appellate Procedure (28 U.S.C. App.) shall be the interim rules of the United States Court of Veterans Appeals unless otherwise provided by the Court in accordance with chapter 72 of title 38, United States Code. If there is a conflict between a provision of the Federal Rules of Appellate Procedures and the procedures set forth in chapter 72 of title 38, United States Code, the procedures set forth in such chapter shall apply.

SEC. 204. EMPLOYEES OF THE COURT.

(a) Employment Authority.—Section 4081 of title 38, United States Code, is amended to read as follows:

§ 4081. Employees

"(a) The Court of Veterans Appeals may appoint a clerk, who shall be subject to removal by the Court. The clerk, with the approval of the Court, may appoint necessary deputies and employees.

"(b) The judges of the Court may appoint law clerks and secretaries in such numbers as the Court may approve.

"(c) The Court may establish such requirements and procedures for the appointment, qualification, classification, and removal of the clerk and other employees of the Court as will promote the efficient operation of the Court without regard to the provisions of title 5. To the maximum extent feasible, the Court and the judges of the Court shall classify and compensate employees in a manner consistent with comparable positions in the judicial branch. Rates of compensation for employees of the Court may not exceed rates of compensation for comparable positions in the judicial branch.

"(d) In making appointments under subsections (a) and (b) of this section, preference shall be given, among equally qualified persons, to persons who are preference eligibles (as defined in section 2108(3) of title 5).

"(e) The Court may procure the services of experts and consultants under section 3109 of title 5.

"(f) The chief judge of the Court may exercise the authority of the Court under this section whenever there are not at least two associate judges of the Court.".

(b) LIMITATION ON CONVERSION OF EMPLOYEES TO COMPETITIVE SERVICE.—Notwithstanding clause (1)(A) of the proviso under the heading "Court of Veterans Appeals" in chapter XI of Public Law 101-45, no employee of the United States Court of Veterans Appeals may be converted to the competitive service without approval of the Court.

(c) EFFECTIVE DATE.—Notwithstanding section 401 of the Veterans Judicial Review Act, the authority provided by section 4081 of title 38, United States Code, as amended by subsection (a), shall take effect on the date of the enactment of this Act.

TITLE III—TECHNICAL CORRECTIONS

SEC. 301. EFFECTIVE DATE FOR NEW RULE FOR REOPENING BOARD OF VETERANS' APPEALS DISALLOWED CASES.

Section 401(d) of the Veterans' Judicial Review Act (Public Law 100-687; 102 Stat. 4122) is amended to read as follows:

"(d) BOARD OF VETERANS' APPEALS.—Sections 202, 203, 205, 206, and 207 shall take effect as of January 1, 1989. Section 204 shall take effect on September 1, 1989.".

SEC. 302. OTHER TECHNICAL AMENDMENTS.

(a) CROSS-REFERENCE TO NEW SECTION.—Section 3301(b)(1) of title 38, United States Code, is amended by striking out "section 4009" and inserting in lieu thereof "section 3009 or 4009".

(b) REVIEW OF COURT DECISIONS.—Section 4092(d)(1) of such title is amended by striking out "statute or".

(c) APPLICABILITY OF AMENDMENTS.—The amendments made by subsections (a) and (b) shall take effect as if included in the Veterans' Judicial Review Act.

(d) REDESIGNATION OF DUPLICATE SECTION NUMBER.—(1) The section 223 of title 38, United States Code, added by section 203(b)(1) of the Veterans' Benefits and Services Act of 1988 (Public Law 100-322; 102 Stat. 509) is redesignated as section 224.

(2) The item relating to that section in the table of sections at the beginning of chapter 3 of that title is revised to reflect the redesignation made by paragraph (1).

TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. NONCAREER APPOINTMENTS IN DEPARTMENT OF VETERANS AFFAIRS.

Section 12(c)(2) of the Department of Veterans Affairs Act (Public Law 100-527; 102 Stat. 2642) is amended—

(1) by inserting "(A)" before "any person"; and

(2) by inserting before the period at the end the following: ", or (B) any person to (i) a Senior Executive Service position as a noncareer appointee, or (ii) a position which is excepted from the competitive service, on a temporary or permanent basis, because of the confidential or policy-determining character of the position".

SEC. 402. ACTING CHIEF JUDGE IN EVENT OF VACANCY.

Section 4054 of title 38, United States Code, is amended by adding at the end the following new subsection:

"(d) In the event of a vacancy in the position of chief judge of the Court, the associate judge senior in service on the Court shall serve as acting chief judge unless the President designates one of the other associate judges to serve as acting chief judge, in which case the judge so designated shall serve as acting chief judge.".

INTRODUCTION

S. 1243, the proposed "Court of Veterans Appeals Judges Retirement Act", was introduced on June 22, 1989, by Senator Alan Cranston, Chairman of the Committee, and by Senator Frank Murkowski, the Ranking Minority Member of the Committee.

S. 1243 as introduced would have established a retirement and survivors benefit program for judges of the United States Court of Veterans Appeals; made provision for certain funding, facility, and personnel needs of the Court; established certain interim rules of procedure; provided for the designation of an acting chief judge in the event of a vacancy; and made certain technical amendments in recent enactments.

As part of the Committee's June 22, 1989, hearing, the Chairman requested the views of various concerned parties on S. 1243, and the following witnesses submitted written testimony on the bill: the then-Chief Judge-designate, Honorable Frank Q. Nebeker, and representatives of The American Legion, the Veterans of Foreign Wars, the Disabled American Veterans, the American Veterans of World War II, Korea, and Vietnam, the Paralyzed Veterans of America, the Vietnam Veterans of America, the National Association of Radiation Survivors, and the Veterans for Due Process. Also, on June 23, the Chairman requested the Office of Management and Budget and the Department of Veterans Affairs to provide the views of the Administration and the Department on the bill. Written responses were submitted by both on July 12.

On June 30, 1989, Public Law 101-45, a fiscal year 1989 supplemental appropriations measure, was signed into law with a provision appropriating $3.1 million for the new Court—the maximum amount that section 201 of S. 1243 as introduced would have provided for by way of temporary transfers from certain Department of Veterans Affairs revolving funds.

After carefully considering the written testimony and the views of the Administration, the Committee met in open session on July 13, 1989, and voted unanimously to report favorably S. 1243 with an amendment in the nature of a substitute.

BASIC PURPOSE OF S. 1243 AS REPORTED

The basic purpose of S. 1243 as reported (hereinafter referred to as "the Committee bill") is to establish a retirement and survivors annuity program—modeled primarily on the program for the judges of the United States Tax Court—for judges serving on the United States Court of Veterans Appeals, the new Article I Court which was established pursuant to division A of Public Law 100-687, the Veterans' Judicial Review Act. This new Court is due to begin operations on September 1, 1989. Other provisions of the Committee bill address issues that the Committee believes should be resolved prior to the beginning of the Court's operations, such as its employment authorities, the rules of procedure which will apply prior to the Court's adoption of rules, and certain technical corrections in the law establishing the Court.

SUMMARY OF COMMITTEE BILL

The Committee bill has four titles: Judges Retirement and Survivor Annuity Program; Provisions Relating to Establishment of Court of Veterans Appeals; Technical Corrections; and Miscellaneous Provisions, as follows:

TITLE I—JUDGES RETIREMENT AND SURVIVOR ANNUITY PROGRAM

This title contains amendments to titles 5 and 38, United States Code, which would establish a retirement and survivor annuity program for the judges on the United States Court of Veterans Appeals, established by chapter 72 of title 38, as enacted by division A of the Veterans' Judicial Review Act. The provisions of title I are summarized as follows:

1. In order to be eligible for the Court of Veterans Appeals retirement plan, a judge would be required while serving as a judge to make an election to participate. Until a judge makes that election, the provisions relating to the civil service retirement program (chapters 83 and 84 of title 5, United States Code) would be applicable to his or her service as a judge.
2. The retirement benefit would be equal to the judge's salary in effect at the time of retirement.
3. For a non-disabled judge to be eligible to retire, either (a) the judge must have reached age 65 and served on the Court at least 15 years, or (b) if the judge is over 65 and has at least 10 and less than 15 years of service, the sum of the judge's years of service and attained age must be 80 or greater. A judge who is not reappointed following the expiration of the term for which appointed and who has served at least 15 years would also be eligible for retirement.
4. A judge who incurs a permanent disability which renders him or her unable to perform the duties of a judge would receive a disability retirement benefit equal to (a) the salary in effect at the time of retirement in the case of those who have served 10 years or more, and (b) one-half of that rate in the case of those who have served less than 10 years.
5. A 1-percent deduction would be made from the salary of a judge who elects to participate in the Court retirement plan. This amount would be deposited in the Court of Veterans Appeals Retirement Fund (hereinafter referred to as the "Retirement Fund"), which would be established by the Committee's bill. In addition, the judge would be required to deposit in the Retirement Fund an amount equal to 1 percent of the total salary received for any period (up to 15 years) of service as a judge prior to the election to participate. Deductions would terminate upon the retirement of the judge or upon the completion of 15 years of service for which deductions or deposits have been made.
6. A judge who elects to participate in the Court retirement plan would be barred from receiving any payment under the civil service retirement laws, regardless of whether the service on which retirement under those laws could otherwise be based is performed before or after the judge's service on the Court. Following the election to participate in the Court retirement plan, no further deductions would be made from the judge's salary for purposes of a civil

service retirement program and the judge would be entitled to a lump-sum refund of all prior deductions.

7. A judge who has elected to participate in the Court retirement plan could revoke that election at any time before his or her retired pay begins to accrue, and that revocation would also terminate the judge's participation in the survivors annuity program (discussed below). The amount previously deducted from the judge's salary for the survivors annuity program and credited to the judge in the Retirement Fund (with interest at 3 percent per year) would be returned to the judge. Credit for the judge's service on the Court would be allowed for CSRS/FERS purposes only when there has been deducted and withheld the amount required by the civil service retirement laws or a deposit has been made in the Civil Service Retirement and Disability Fund in an amount equal to that required, with interest. The Court would be required to deposit in that Fund an amount equal to the additional amount it would have contributed to the Fund but for the original election to participate in the Court retirement system.

8. The retirement pay for a retired judge who receives compensation for any Federal employment would, during the period for which that compensation was received, be reduced by the amount of the compensation.

9. In order for a judge to provide his or her spouse and children with the benefits of the survivors annuity plan, the judge would be required, while serving as a judge, to make an election to do so.

10. A 3.5-percent deduction would be made from the salary and retirement pay of a judge who has elected the survivors annuity. These amounts would be deposited in the Retirement Fund. In addition, the judge would be required to deposit in the Retirement Fund with interest a sum equal to 3.5 percent of previous salary earned for any service as a judge, other Federal civilian service, or service as a Member of Congress for which no deduction has been made under the civil service retirement laws. A judge would be permitted to make deposits in installments during the judge's period of service.

11. No deposit would be necessary for any year for which a deposit or deductions from the judge's salary were made (and not withdrawn) under the civil service retirement laws.

12. If a required deposit were not made, the annuity of the surviving spouse would be reduced by an amount equal to 10 percent of the amount of the unmade deposit, unless the spouse chose to have that period of service disregarded for purposes of calculating the annuity.

13. The survivor's annuity would be payable only if the judge had rendered at least 5 years of civilian service and the deduction described in item 10, above (or a comparable deduction under the civil service retirement laws) had been made for at least the last 5 years of service as a judge or of other allowable civilian service.

14. For purposes of calculating the amount of the annuity for a surviving spouse, civilian service described in section 8332 of title 5 (generally, all Federal civilian service), service as a Member of Congress, and up to 5 years service in the Armed Forces would be credited if the judge makes the required contributions—3.5 percent of

the compensation received for Federal civilian service and for service as a Member of Congress.

15. A surviving spouse's annuity generally would be calculated by adding the following amounts:

(a) 1.5 percent of the judge's average annual pay (including both salary and retirement pay) times the number of years of judicial service, prior service as a Member of Congress, prior service (up to 5 years) as a member of the Armed Forces, and up to 15 years of prior service as a congessional employee; and

(b) 0.75 percent of the judge's average annual pay (including both salary and retirement pay) times the years of any other allowable Federal civilian service.

However, an annuity could not exceed 50 percent, or be less than 25 percent, of the judge's average annual pay for the 3 consecutive years in which the judge received the highest average annual pay (the "high-three years"), regardless of whether the 3 years were judicial service or retirement or other prior allowable Federal service.

16. Whenever the salaries of Court of Veterans Appeals judges are increased, the amount of an annuity which is based in whole or in part upon a deceased judge having rendered some portion of his or her final 18 months of allowable service as a judge of the Court would also be increased by an amount equal to 3 percent of the annuity for each full 5 percent by which the salary is increased.

17. Where there is a surviving spouse and a surviving dependent child or children, the surviving spouse would be entitled to an annuity immediately upon the judge's death and an additional annuity of 10 percent of the judge's average annual pay for the high-three years would be payable on behalf of a dependent child. If there is more than one dependent child, the additional annuity payable would be equal to 20 percent of such pay. Where there is no surviving dependent child, the surviving spouse would not be eligible for annuity payments until attaining age 50.

18. If the judge is not survived by an eligible spouse but is survived by a dependent child or children, an annuity would be payable for such child. If there are one or two children, the annuity for each would be equal to 20 percent of the judge's average annual pay for the high-three years. If there were three or more children, the annuity for each would be equal to 40 percent of such pay divided by the number of children. A child's annuity would be payable until the child reaches age 18 or, in the case of a full-time student, age 22. A child who becomes incapable of self-support because of physical or mental disability incurred before age 18 would be entitled to an annuity regardless of age.

19. If a judge dies in office before having rendered 5 years of service or without a survivor or survivors entitled to an annuity, the amount contributed by the judge would be paid to any beneficiaries designated by the judge, to certain relatives of the judge, or to the estate of the judge.

20. A surviving spouse who is eligible for an annuity under any law other than the Committee's bill based on service not used in the computation of the Court of Veterans Appeals survivors annu-

ity (as described in item 13 above) would be entitled to the annuity under that other law.

21. The Secretary of the Treasury would be required to invest amounts of the Retirement Fund not immediately required for retirement and annuity payments in interest-bearing securities of the United States.

22. Survivors annuities would be exempt from assignment, execution, levy attachment, garnishment, or other legal process.

23. Subject to the availability of appropriations, an amount equal to the unfunded liability of the Retirement Fund—defined as the amount by which the present value of benefits payable from the fund exceeds the present value of future contributions to and the current balance of the fund—would be deposited in the Retirement Fund prior to the end of each fiscal year.

TITLE II—PROVISIONS RELATING TO ESTABLISHMENT OF COURT OF VETERANS APPEALS

This title contains amendments to title 38, United States Code, and to the Dire Emergency Supplemental Appropriations Act, 1989 (Public Law 101-45), and freestanding provisions that would:

1. Direct the Administrator of General Services, on a priority basis, to make arrangements to secure suitable permanent and temporary building space for the Court.

2. Extend the time for filing an appeal to the Court, as provided for in section 4066 of title 38, to provide that a notice of appeal may be filed by the end of the 30-day period beginning on the date the Court causes a notice of its commencement of operations to be published in the Federal Register.

3. Provide for the Federal Rules of Appellate Procedure (to the extent not inconsistent with any provisions of chapter 72 of title 38) to be the interim rules of the Court until the Court itself adopts rules of practice and procedure pursuant to chapter 72 of title 38.

4. Authorize the Court to establish its own requirements and procedures for the appointment, qualification, and classification of a clerk and other employees without regard to the provisions of title 5, United States Code, but require that Court employees be classified and compensated in a manner consistent with comparable positions in the judicial branch (with compensation levels not to exceed those for comparable positions); authorize each judge to appoint his or her law clerks and secretaries; require a preference, among equally qualified candidates, for those who are eligible for veterans preference; authorize the use of the services of experts and consultants; and permit the chief judge to exercise the Court's employment authorities whenever there are less than two associate judges.

5. Provide that employees appointed pursuant to the interim employment authority granted by Public Law 101-45 may not be converted to competitive service status without the Court's approval.

TITLE III—TECHNICAL CORRECTIONS

This title would make a series of technical corrections in the provisions of, and title 38 amendments made by, Public Law 100-687.

TITLE IV—MISCELLANEOUS PROVISIONS

This title contains amendments to the Department of Veterans Affairs Act (Public Law 100-527) and to title 38 that would:

1. Make certain non-career and excepted-service appointments in the Department of Veterans Affairs exempt from the general prohibition against political tests for VA employees.
2. Provide, in the event of a vacancy in the office of the chief judge, for the most senior associate judge to serve as acting chief judge until the President designates an acting chief judge.

DISCUSSION

TITLE I—JUDGES RETIREMENT AND SURVIVOR ANNUITY PROGRAM

Background

As the 100th Congress drew to a close, the Committees on Veterans' Affairs of the Senate and the House of Representatives reached a compromise concerning the previously controversial issue of judicial review of the denial of veterans' benefit claims. That compromise, embodied in the Veterans' Judicial Review Act, became possible when, after efforts by the Senate over the proceeding 10 years to grant veterans the right of access to the courts, the House of Representatives, on October 3, 1988, passed a judicial review bill of its own. The House and Senate Veterans' Affairs Committees—racing against the clock as the 100th Congress wound down—worked swiftly to develop a fair, equitable, and effective compromise. During that process, there was insufficient time to consider fully the complexities involved in establishing a retirement system for the judges in the new United States Court of Veterans Appeals. Accordingly, the Court of Veterans Appeals was created without such a system for its judges other than the Civil Service Retirement System (CSRS) and Federal Employees Retirement System (FERS), under chapters 83 and 84, respectively, of title 5, United States Code, generally applicable to Federal civilian employees. That left the new Court of Veterans Appeals, together with the United States Claims Court as the only Federal courts lacking a separate retirement system.

Thus, the Committee bill is designed to establish for the judges of the new Court a retirement and annuity program that would place it on a comparable footing in this regard in relation to other Federal courts; help ensure the long-term ability of the Court to attract and retain the quality of judges desired and needed to establish and maintain the Court of Veterans Appeals as a first-class judicial body; and to provide a fair and equitable reward for the service rendered by the judges.

In order to fashion a system that would meet these goals, the Committee has reviewed retirement systems for various Article I courts, such as the Court of Military Appeals (10 U.S.C. 867), the United States Tax Court (26 U.S.C. 7447 and 7448), and the United States Claims Court (5 U.S.C. 8301 et seq. and 8401 et seq.), as well as retirement systems for Article III courts, specifically the United States District Courts (28 U.S.C. 371) and the Bankruptcy Courts (28 U.S.C 377), which operate under the direction of the District

Courts. As this review progressed, two things became apparent: First, each court had a distinctly different retirement system; and, second, every system except that of the Claims Court provides more generous benefits than CSRS/FERS.

The Committees have now developed, in the Committee bill and in a companion bill (H.R. 2727) in the House of Representatives, a proposed retirement system that draws heavily on the features of the Tax Court program, with modifications primarily to address the differences in size and scope of review between the Tax Court and the Court of Veterans Appeals. For instance, although the Tax Court, as a trial court with jurisdiction over the Federal Government's vast internal revenue enterprise, appears to require a mechanism to recall its retired judges back to the bench for a period of time each year because of its enormous, fluctuating workload, the Committee had no basis for concluding at this point that the Court of Veterans Appeals—as an appellate court of up to seven judges reviewing the record of Board of Veterans' Appeals cases—will have such a need. Accordingly, recall and related provisions were not included in this measure.

Retirement System

Section 101 of the Committee bill would amend chapter 72 of title 38, United States Code, relating to the United States Court of Veterans Appeals, to add a new Subchapter V, "Retirement and Survivors Annuities", consisting of three sections: Section 4096, "Retirement of judges"; Section 4097, "Survivor annuities"; and Section 4098, "Court of Veterans Appeals Retirement Fund".

Under new section 4096, judges on the Court of Veterans Appeals who elect to be covered by the Court's retirement system and make the required contributions would be eligible to retire after age 65 if they have served at least 15 years. A judge who is over 65 and has at least 10 years of service would be eligible for retirement if the sum of the judge's years of service and age equals 80 or more. Upon retirement, a judge would receive the equivalent of the salary of the office at the time of the judge's retirement for the rest of his or her life.

A judge who serves his or her full term of 15 years and seeks reappointment, but who is not reappointed by the President would also be eligible for retirement, regardless of age. This provision protects the judge who served an entire term but for whatever reason is not given a reappointment.

Likewise protected is a judge who incurs a permanent disability that prevents the proper execution of the duties of the office. Regardless of age, a disabled judge who has served 10 or more years would receive retired pay equal to the salary of the office at the time of retirement. If the judge who becomes disabled has served less than 10 years, he or she would be entitled to one-half of the salary in effect at the time of retirement.

Although the Court of Veterans Appeals is much too small to fund its own actuarially sound retirement and survivors annuity system without very large individual contributions, and the Committee recognizes that appropriations will be necessary to keep the retirement fund solvent, the Committee also believes that it is conceptually sound and prudent to have the judges make a contribution to their own retirement program, as well as to their survivors' annuities. Having followed the Tax Court system with regard to most other provisions, the Committee decided to follow it with regard to contributions, with a modification borrowed from the Bankruptcy Court system to require a modest contribution by the judges to their own retirement.

Tax Court judges make no contribution to their own retirement, but make a contribution to their survivors' annuity equaling 3.5 percent of their annual salary or retirement pay. Bankruptcy judges contribute 1 percent of their annual salary to their own retirement for their first term of service which is 14 years, and contribute 5 percent of their salaries and retired pay to their survivors' annuities.

The Committee bill would require the judges of the Court of Veterans Appeals to contribute 1 percent of their annual salaries to their own retirement system, for the first 15 years of their service, and 3.5 percent of their annual salaries and retirement pay to the survivors annuity system.

As in the case of most other judicial retirement systems, an election to participate in the Court of Veterans Appeals retirement system must be made by the judge prior to leaving office. Accordingly, someone who has been contributing to CSRS or FERS could continue to participate in that program while serving as a judge until enough time has passed to vest in the Court's retirement system. This flexibility would allow the judges to tailor their retirement systems to their individual personal circumstances. Once an election is made, the judge's CSRS or FERS contributions would be returned in a lump sum (under section 8342(a) or 8424, of title 5, respectively) and the judge would be required to contribute to the Court of Veterans Appeals retirement system the equivalent of 1 percent of the judge's annual salary for each year served, up to 15 years.

A judge who has elected to participate in the Court retirement plan could revoke that election at any time before his or her retired pay begins to accrue, and that revocation would also terminate the judge's participation in the survivors annuity program. The amount previously deducted from the judge's salary for the survivors annuity program and credited to the judge in the Retirement Fund (along with interest at 3 percent per year), would be returned to the judge. Credit for the judge's service on the Court would be allowed for CSRS/FERS purposes only when there has been deducted and withheld the amount required by the civil service retirement laws or a deposit has been made in the Civil Service Retirement and Disability Fund in an amount equal to that required, with interest. The Court would be required to deposit in that Fund an amount equal to the additional amount it would have contributed to the Fund but for the original election to participate in the Court retirement system.

If a retired judge accepts compensation for employment with the Federal Government, the retired pay for the period for which the compensation was received would be reduced by the amount of the compensation received. The Tax Court provision regarding Federal employment of a retired judge requires a retired judge who receives compensation for work in the Federal Government to forfeit all retired pay while receiving such compensation. The Committee believes that the offset provision in the Committee bill strikes an appropriate balance and would not unduly discourage judges from serving the Federal Government after retiring from the Court.

Survivors Annuity Program

The survivors annuity plan that would be established by new section 4097 of title 38 is modeled directly on the one utilized by the Tax Court plan. As with the retirement plan, a judge would have to elect to participate in, and make contributions to, the survivors annuity program.

Once a judge made an election to provide a survivors annuity, a deduction of 3.5 percent would be made from the judge's salary and retired pay and the amounts deducted would be deposited in the Retirement Fund. In addition, the judge would be required to deposit in the Retirement Fund, with interest, a sum equal to 3.5 percent of previous salary earned for service as a judge, for other Federal civilian service, and for service as a Member of Congress, for which deductions were not currently on deposit under either the CSRS or FERS plan. A judge could elect to make that deposit in installment payments in such amounts and under such conditions as the chief judge determines. A judge could opt not to make such a deposit, in which case the years of service for which no deposit is made could be counted for purposes of the annuity plan, but the annuity of the surviving spouse would be reduced by an amount equal to 10 percent of the amount of the unmade deposit. The spouse could, however, choose to have that period of service disregarded for the purpose of calculating the annuity rather than incur the 10-percent reduction.

The survivors annuity would be payable only after the judge had rendered at least 5 years of service as a judge, other countable Federal civilian service, or service as a Member of Congress and only if the deduction and deposit, as described above, had been made for the last 5 years of service.

Where a deceased judge has met these requirements, the eligible spouse and dependent children would be paid an annuity pursuant to a computation based on the judge's time of service on the Court and other prior Federal service (including service as a Member of Congress, up to 5 years of service as a member of the Armed Forces, and up to 15 years as a congressional employee). However, the annuity would not exceed 50 percent, or be less than 25 percent, of the judge's average annual pay (including retired pay) for the judge's "high-three" years of Federal service. The judge's average annual pay for this purpose would be based on the 3 consecutive years in which the judge received the highest average annual pay from the Federal Government, regardless of whether the 3 years were judicial service or retirement or other allowable service, or a combination thereof.

To ensure that children of a judge are provided for, the survivors annuity provisions would entitle a surviving spouse with a surviving dependent child or children to an annuity immediately upon the judge's death. An additional annuity equal to 10 percent of the judge's "high-three years" average annual pay would be payable on behalf of a dependent child. If there were more than one dependent child, the additional annuity would be equal to 20 percent of such pay.

If there were no surviving dependent child, the surviving spouse would not be eligible for annuity payments until attaining age 50. A surviving spouse's entitlement to an annuity would terminate if he or she remarried before reaching age 55.

If a judge is survived by a child but not by an eligible spouse, an annuity equal to 20 percent of the judge's "high-three years" average annual pay would be payable for the child. If there were more than one surviving dependent child, the annuity of each child would be equal to 40 percent of such pay divided by the number of children.

The Committee bill would entitle a child to an annuity payment until he or she reaches age 18. However, in recognition of the importance of encouraging a child toward higher education by providing support through his or her years of schooling, in the case of a child who is a full-time student, the annuity would be paid until the child reaches age 22. Also, recognizing a parent's extended responsibility for a disabled child, in the case of a child who is incapable of self-support because of physical or mental disability incurred before age 18, the child would be paid an annuity regardless of age.

Should a judge die in office before having rendered 5 years of service or without a survivor or survivors entitled to an annuity, the amount contributed by the judge to the annuity program would be paid to beneficiaries designated by the judge, to certain relatives of the judge, or to the estate of the judge. This provision would ensure that the contributions made by the judge into the system would be paid out in accordance with the judge's wishes. Additionally, survivors annuities would be exempt from assignment, execution, levy attachment, garnishment, or other legal process.

Retirement Fund

New section 4098 of title 38 would establish the Court of Veterans Appeals Retirement Fund in the United States Treasury and establish certain principles for the administration of the new fund.

The Retirement Fund would consist of all amounts deducted and withheld from the salary or retired pay of a judge and deposited by a judge—which would be credited to an individual account of the judge—and funds authorized to be appropriated annually to cover any unfunded liability of the Fund (as discussed below).

As indicated above, it would be impractical to establish an actuarially sound program under which the judges' contributions would fully fund the retirement and survivors annuity plans. So as to make the best use of the funds available, the Committee bill includes provisions requiring the Secretary of the Treasury to invest in interest-bearing securities of the United States any amounts in the Retirement Fund that are not immediately required for payments.

To ensure that the Fund is sufficient to meet its responsibilities, the unfunded liability of the Fund—defined as the amount by which the present value of benefits payable from the Fund exceeds the present value of future contributions to and the current balance of the Fund—would, subject to the availability of appropriations, be deposited in the Retirement Fund prior to the end of each fiscal year.

Conforming Amendments

Section 102 (a) and (b) of the Committee bill would make conforming amendments to sections 8334(i) and 8402 of title 5, relating to the CSRS and FERS plans, respectively to specify that judges electing to participate in the Court of Veterans Appeals retirement plan are excluded from the operation of the CSRS and FERS plans and, in the cases of those with prior service covered by CSRS or FERS, entitled to a lump-sum refund of any amounts that they contributed (through salary deduction or otherwise) to the Civil Service Retirement and Disability Fund.

Section 102(c) of the Committee bill would amend section 4053(f)(1) of title 38, relating to the grounds for removal of a Court of Veterans Appeals judge, to delete the provision relating to the President's authority to remove a judge with a disability which prevents the proper execution of the judge's duties. The subject of removal for disability would be covered, as discussed above, by new section 4096. Under new section 4096(g), a judge may voluntarily retire on grounds of disability or be involuntarily retired by the President after having been given, as under current law, a full specification of the reasons and the opportunity to be heard.

TITLE II—PROVISIONS RELATING TO ESTABLISHMENT OF COURT OF VETERANS APPEALS

Facilities for the Court

Section 201 of the Committee bill would direct the Administrator of General Services, on a priority basis, to make arrangements to secure suitable temporary and permanent building space, acceptable to the Court for use by the Court. Permanent space would be required to be adjacent to space, also acceptable to the Court, that would be available for expansion of the Court if needed at a later time.

The Committee intends that, in selecting space, both GSA and the Court focus on the long-term future and status of the Court. This would include finding space with the architectural dimensions and dignity appropriate for courtrooms. The Acting Administrator has assured the Committee of GSA's commitment to securing appropriate space for the Court. The July 11, 1989, letter from the Acting Administrator, Richard G. Austin, to Chairman Cranston follows:

Administrator
General Services Administration
Washington, DC 20405

July 11, 1989

The Honorable
Alan Cranston
Chairman, Committee on
Veterans' Affairs
United States Senate
Washington, DC 20510-6375

Dear Mr. Chairman:

The purpose of this letter is to inform you of the efforts of the General Services Administration (GSA) to provide short-term and long-term solutions to the space needs of the United States Court of Veterans Appeals.

The immediate needs of Chief Judge Nebeker have been satisfied through the use of existing office and hearing room space. The GSA has begun the formal process to acquire space to permanently house the Court of Veterans Appeals. A newspaper advertisement requesting offers of space was run on June 19, 1989 and we are now visiting each of the locations to assess their ability to meet the required needs. Our plan also includes acquiring additional space which can be made available for future expansion. We are confident that the private sector leasing market can provide space which will meet all the needs of this activity.

I would also like to take this opportunity to comment on the draft bill, the "Court of Veterans Appeals Judges Retirement Act", as it pertains to this matter. The Act would provide the Court of Veterans Appeals with 30,000 square feet of space in the City Post Office, as well as an additional 30,000 square feet for unspecified expansion of court activities in the future. GSA is currently negotiating a lease for the entire City Post Office with the U.S. Postal Service which would provide for the consolidation of the Bureau of Labor Statistics (BLS) from their four current locations and space for congressional computer activities designated by the Architect of the Capitol (AOC). A signed Memorandum of Understanding between GSA and the AOC relating to this plan has been in place for nearly 1 year. Construction to accomplish this effort will begin later this year and take approximately 2 years to complete. To attempt to house the Court of Veterans Appeals at the City Post Office would mean that the long planned consolidation of BLS could not be implemented as sufficient space for all these activities is simply not available.

Furthermore, the U.S. Postal Service plans to construct a 'Postal Museum' on the first floor of the building. The museum will include many items now on display at the Smithsonian Institution, such as early Postal Service aircraft, and will be visited by thousands of tourists each year. I believe that to place the Court of Verterans Affairs in such an environment would significantly detract from the proper dignity which should be accorded such an activity as well as severely complicate the day-to-day security measures.

In summary, we are confident that high-quality space, which will meet both the current and long term requirements of the Court of Veterans Appeals, can be provided through a lease with the private sector in a very timely manner.

Please do not hesitate to contact me if I can be of further assistance regarding this matter.

With best wishes.

Sincerely,

Richard G. Austin
Acting Administrator

Interim Provision for Filing Notices of Appeal

Section 202 of the Committee bill addresses the concern that, in a case subject to Court of Veterans Appeals review, a decision of the Board of Veterans' Appeals (BVA) could be made more than 120 days prior to the time the Court of Veterans Appeals begins to operate, thereby making it impossible for the claimant to make a timely appeal to the Court under section 4066 of title 38, United States Code, under which those whose claims are denied at the BVA have 120 days to file a notice of appeal.

Although the Court is scheduled to be operating on September 1, the Committee is concerned that this may not happen. So as to deal with such a delay should it occur, section 203 would extend the time in which a notice of appeal must be filed to the 30th day after the Court causes a notice of its commencement of operation to be published in the Federal Register, where that date would be later than the 120th day after the notice of the BVA decision is mailed.

Interim Rules of the Court

In order to ensure that the Court has rules under which to operate prior to the Court itself being constituted and thus having the opportunity to establish its own rules, section 203 of the Committee bill would make the Federal Rules of Appellate Procedure, except any rules that may be in conflict with chapter 72 of title 38, applicable to Court of Veterans Appeals proceedings until the Court itself adopts rules under that chapter.

By making the Federal Appellate Rules generally applicable, this legislation would help enable practitioners to prepare their appeals. However, once the Court is ready to begin operations, the Committee expects the Court—consistent with Congress' intent last year when it granted the Court authority to prescribe its own rules of practice—to assume responsibility for its own rules as soon as it is feasible for it to do so.

In this regard, the Committee notes that, under subsection (e) of section 2071 of title 28, United States Code, as added by section 403(a) of the Judicial Improvement and Access to Justice Act (Public Law 100-702), enacted on November 19, 1988, the Court may adopt rules without previously following the notice-and-comment requirements of section 2071(b) of title 28, if the Court determines that there is an immediate need for the rules involved. In the Committee's view, such a determination would be appropriate for the Court to make in connection with the Court's initial adoption of its own rules at the outset of its operations.

Authority to Employ Personnel

Section 4081 of title 38, United States Code, as enacted in Public Law 100-687, provides that the Court may appoint such employees as may be necessary and that such appointments must be made in accordance with the provisions of title 5 governing appointment in the competitive service, except that the classification of Court employees' positions may be based on judicial branch classifications.

In early May, the Court of Veterans Appeals' then-Chief Judge-designate Nebeker, whose nomination was confirmed by the Senate on May 17, 1989, brought to the Committee's attention the need for modification of the Court's employment authorities in order to bring employees on board expeditiously as soon as funds were made available to the Court. Before the new Court begins hearing cases on September 1, 1989, as contemplated by the Veterans' Judicial Review Act, it must be able to hire staff, arrange for courtrooms and offices, acquire furnishings and equipment, establish procedures and rules of practice, and complete a multitude of other housekeeping and administrative arrangements. Chief Judge-designate Nebeker pointed out to the Committee that he foresaw very serious practical difficulties arising from the mandate to comply with competitive-service requirements in the appointment of certain personnel. He noted that using the civil-service-register process could delay by months the hiring of personnel that will be needed from virtually the very first day that the Court receives funding, particularly a clerk, deputy clerk, administrative officer, and certifying officer.

Consequently, Chairman Cranston, by letter dated May 9, 1989, asked the Chair of the Appropriations Subcommittee on VA, HUD, and Independent Agencies, Senator Barbara Mikulski, to include in H.R. 2072, the FY 1989 dire emergency supplemental appropriations measure, in which the initial funding for the Court was then being proposed, statutory language to provide the Court with the authority for making initial appointments, without regard to the title 5 competitive-service requirements, of a clerk, deputy clerk, administrative officer, and certifying (fiscal) officer and of up to 30 other employees during calendar year 1989. That requested provision was included in the measure reported by the Appropriations Committee on May 31. Chairman Cranston's letter (without enclosure) follows:

ALAN CRANSTON, CALIFORNIA, CHAIRMAN

SPARK M. MATSUNAGA, HAWAII
DENNIS DeCONCINI, ARIZONA
GEORGE J. MITCHELL, MAINE
JOHN D. ROCKEFELLER IV, WEST VIRGINIA
BOB GRAHAM, FLORIDA

FRANK H. MURKOWSKI, ALASKA
ALAN K. SIMPSON, WYOMING
STROM THURMOND, SOUTH CAROLINA
ARLEN SPECTER, PENNSYLVANIA
JAMES M. JEFFORDS, VERMONT

JONATHAN R. STEINBERG, CHIEF COUNSEL/STAFF DIRECTOR
ALAN C. PTAK, MINORITY CHIEF COUNSEL/STAFF DIRECTOR

United States Senate
COMMITTEE ON VETERANS' AFFAIRS
WASHINGTON, DC 20510-6375

May 9, 1989

Honorable Barbara Mikulski
Chair
Subcommittee on VA, HUD and Independent Agencies
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Dear Barbara,

I am writing to request your help again with respect to the operation of the new U.S. Court of Veterans Appeals, which was established under Public Law 100-687 as the culmination of over 10 years of work to provide veterans with the right to judicial review of VA decisions denying their claims for benefits. Before the Court begins hearing cases on September 1, 1989, it must be able to hire staff, arrange for court rooms and offices, acquire furnishings and equipment, establish procedures and practice rules, and complete a multitude of other housekeeping and administrative arrangements.

Section 4081 of title 38, United States Code, as enacted in Public Law 100-687, provides that the Court may appoint such employees as may be necessary to execute the functions vested in the Court and that such appointments must be made in accordance with the provisions of title 5 governing appointment in the competitive service, except that the classification of positions may be based on judicial branch classifications.

The Court's Chief Judge-designate, Honorable Frank Q. Nebeker, has pointed out that he foresees very serious practical difficulties arising from the mandate to comply with competitive-service requirements in the appointment of certain personnel. Thus, he noted that using the civil-service-register process would delay by months the hiring of personnel that will be needed from virtually the very first day that the Court receives funding, particularly a clerk, deputy clerk, administrative officer, and certifying officer.

I believe this concern is well founded and am thus requesting that your Subcommittee include in the FY 1989 supplemental appropriations measure, in which the initial funding for the Court is being provided, the enclosed statutory language providing the authority, without regard to the title 5 competitive-service requirements, for making initial appointments of a clerk, deputy clerk, administrative officer, and certifying (fiscal) officer and of up to 30 other administrative positions, and for filling any vacancies that may occur in those positions, during calendar year 1989.

I appreciate your consideration of this issue and your continued efforts to ensure that the long-sought right Congress recently accorded to veterans and other claimants to have their benefit claims reviewed by an independent judicial entity is effectuated in a timely and effective manner.

With warm regards,

Cordially,

Alan Cranston
Chairman

Enclosure

Such a provision—limited to fiscal year 1989 and making the employees hired under this authority eligible to apply to the Office of Personnel Management for conversion to competitive status—was enacted in the *proviso* under the heading "COURT OF VETERANS APPEALS" in chapter XI of Public Law 101-45, enacted on June 30, 1989.

The provision as enacted provides:

> *Provided,* That, notwithstanding section 4081 of title 38, United States Code, during fiscal year 1989 (1) the United States Court of Veterans Appeals may (A) without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, appoint not to exceed 35 employees (and employees to replace any employees so appointed whose employment by the Court is terminated) who shall be eligible for noncompetitive conversion to a position in the competitive service if (i) application therefore is made to the Office of Personnel Management by December 31, 1990, and (ii) the Director of the Office of Personnel Management determines that such noncompetitive conversion is in the interest of the Government, and (B) procure the services of experts and consultants under section 3109 of such title, (2) in the making of appointments pursuant to clause (1), preference among equally-qualified persons shall be given to persons who are preference eligibles (as defined in section 2108(3) of such title), and (3) the authorities provided in clause (1) may be exercised by the Chief Judge of the Court whenever there are not at least two Associate Judges on the Court

On June 30, 1989, Chief Judge-designate Nebeker wrote the following letter to Chairman Cranston:

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

June 30, 1989

By Hand

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510-6375

Dear Mr. Chairman:

I write to offer my comments on the proposed "Court of Veterans Appeals Judges Retirement Act" bill you forwarded to me. I understand that the bill is on a very fast track, so I have prepared these comments on an expedited basis. If there is a further opportunity for comment, I would be pleased to expand on these remarks.

Before commenting on the proposed legislation, I wish to renew my plea, for the reasons outlined in my June 8, 1989, letter to you, that 38 U. S. Code § 4053 be modified to provide for the traditional parity of salary at the circuit judge level for associate judges of the United States Court of Veterans Appeals.

As far as the proposed "Court of Veterans Appeals Judges Retirement Act" is concerned, I have reservations or comments about only three components of the bill: 1) the employment provisions for the Court (section 205); 2) the facilities for the Court (section 202); and 3) the need to provide for upward adjustment in calculations of retirement and survivor annuity pay (§ 4096).

Having consulted with the Office of Personnel Management ("OPM"), which in turn has been working closely with the Administrative Office of the United States Courts to help me develop a staffing plan for the Court, I have grave concerns about both the current and proposed provisions governing the employment of non-judicial personnel. (§ 4081 of the original legislation and section 205 of the proposed bill) For the reasons that follow, I urge that all of § 4081 following the first sentence be deleted. In that event, section 205 of the new legislation would be unnecessary, except that there would still be the need for a provision establishing the interim authority of the Chief Judge.

After considering the legislation and speaking with other courts' personnel and with OPM, I have concluded that the idea to impose the restrictions of title 5 of the United States Code, governing appointments in the competitive service, on any part of the Court's employing authority would eviscerate the Court's much-needed judicial independence and would reek havoc on the effective operation of the Court. OPM has informed me that the proposed grafting of the competitive service provisions and executive branch standards onto the Court's staffing needs would be problematic and difficult to achieve; there is simply no direct correlation between qualification standards within the executive branch and the judicial classification system - - a veritable "apples with oranges" mixture. Moreover, if the Court were to be saddled with the title 5 requirements, OPM most likely would propose that the Court be delegated examination authority to circumvent some of the difficulties of the competitive examination process. Under that scenario, the Court would be obliged to run its staffing under the training, auspices and oversight of OPM. Such a system would be costly, time-consuming, extremely burdensome, unnecessary and, most importantly, antithetical to the traditional notions of judicial independence.

Because the current law, §4081, and the proposed modification, section 205, both would render the Court subject to the control of the executive and the competitive service provisions of title 5, I must register my strong objection to subjecting the Court to treatment that would hamstring, if not cripple, its operations. I cannot think of a single virtue in having a judicial body bound by executive branch regulations and beholden to the executive branch. From my considerable judicial experience and from speaking with other courts' personnel, I am firmly convinced that unless all non-judicial personnel serve at the pleasure of the Court, it will be most difficult to operate the Court in an efficacious and efficient manner. As a judicial body, the Court needs flexibility - - not to be faced with procedural hurdle after hurdle when seeking to employ non-judicial personnel. While the proposed legislation would exempt the Court's first 35 employees from the title 5 requirements (if they were hired before December 31, 1989), that proposal does not go far enough and may even exacerbate the problem by creating two sets of employees: those who were hired outside the title 5 provisions and those who were hired subject to title 5.

I strenuously urge that § 4081 be modified so that only the first sentence of the current section remains: "The Court of Veterans Appeals may appoint such employees as may be necessary to execute the functions vested in the Court." Concomitant with the Court's authority, I recommend that the language of the Interim Authority provision, proposed section 205(d) be modified as follows and added to § 4081:

> The authority provided in this section may be exercised by the chief judge whenever there are not at least two associate judges of the Court.

My second area of concern about the proposed legislation is the requirement of section 202, entitled "Facilities for Court," that seems to require the Court to be housed in the Post Office Building adjacent to Union Station if the Administrator of the General Services Administration ("GSA") enters into a long-term lease arrangement for that space. While I understand that GSA will be commenting on section 202 of the proposed legislation, I offer my own comments on the provision. I have visited the Post Office Building in my quest to find suitable permanent quarters for the Court and have consulted with GSA about that and other locations. GSA has informed me that the Post Office Building is already totally occupied and that GSA has expended substantial sums of money to plan the space in that building.

Given the other purposes planned for the building, it appears that that location would be unsuitable for housing the Court. In any event, the ability to occupy the Post Office Building space would be years away. It is vital that the Court be housed in its permanent quarters no later than January 1, 1990, as the temporary space already arranged for the Court is makeshift at best. As a result, I recommend that section 202 be deleted from the bill. If the provision remains even though the Post Office Building space is already committed, I ask that the provision not be mandatory and instead be exercisable at the option of the Chief Judge so that my hands are not tied in starting the operations of the Court.

My third area of comment concerns Title I of the Act, the Judges Retirement and Survivor Annuity Program. In three of the sections of the bill, I feel that provisions need to be added providing for potential upward adjustments of retirement pay and survivor's annuity, similar to adjustment mechanisms in place for all other retirees and survivors. I recommend that § 4096 (c)(1) be amended by adding the following language at the end of the current provision: "subject to upward adjustment in the event of any increase in the rate of pay of the Chief Judge or the Associate Judges of the Court." For §§ 4096 (c)(2) and 4097(k)(1), I recommend that the calculations for benefits under those sections be subject to upward adjustment by inclusion of a Cost of Living Allowance. I feel that these modifications are necessary in order that the judges' benefits not be diminished by the effects of inflation.

I appreciate the opportunity to offer my observations on the proposed legislation. Please let me know if the Committee wishes me to expand on these remarks. If you or your staff members have any questions concerning these comments, please contact me or Melanie Dorsey of my legal staff at 523-5757.

Sincerely,

Frank Q. Nebeker/mes

Frank Q. Nebeker

Upon further consideration, the Committee believes the Court of Veterans Appeals, like the United States Claims Court, should have the discretion to appoint all of its employees without regard to title 5, United States Code, provisions governing appointments in the competitive service.

Accordingly, section 204 would amend section 4081 of title 38 to provide the Court with authority to hire a clerk, and to give the clerk authority, with the approval of the Court, to appoint necessary deputies and employees. The Court also would have the power to establish such requirements and procedures for the appointment, qualification, classification, and removal of the clerk and other employees as would promote the efficient operation of the Court. To the maximum extent feasible, the Court and the judges would be required to classify and compensate employees in a manner consistent with comparable positions in the judicial branch. In no event, however, could the rates of compensation exceed the rates for comparable positions in the judicial branch. Individual judges would have the authority to appoint their own law clerks and secretaries, subject only to the Court's approval as to the number of positions available to each judge.

Other provisions in section 204 would require preference to be given, among equally qualified persons, to those veterans and other persons who are preference eligibles under section 2108(3) of title 5 and grant the Court permanent authority to procure the services of experts and consultants under section 3109 of title 5. The temporary authority enacted in Public Law 101-45 for expert and consultant appointment authority expires at the end of the current fiscal year—on September 30, 1989.

To facilitate the operation of the Court when there are fewer than three judges serving, the chief judge would be given the authority to exercise the authority of the Court with regard to appointing personnel whenever there are not at least two associate judges on the Court.

As noted above, prior to the enactment of the Committee bill, Public Law 101-45 authorized the Court to appoint up to 35 employees without regard to the competitive-service requirements in title 5 and an employee hired pursuant to that authority who applies for conversion before December 31, 1990, was made eligible, for conversion to competitive status if the Director of the Office of Personnel Management determines that conversion is "in the interest of the Government." Since the employees hired pursuant to the Court's proposed new permanent employment authority would not be in the competitive service, the Committee doubts that it would be in the best interest of the Court itself for any of the employees hired pursuant to the temporary authority in Public Law 101-45 to be converted to competitive status. Thus, section 204 would also provide that notwithstanding this provision in Public Law 101-45, no employee could be converted to the competitive service without the approval of the Court.

The Committee stresses that Court employees would be included in the definition of "employee" in section 2105(a) of title 5 and be part of the civil service as defined in section 2101 of title 5, and the following chapters of title 5 thus would be applicable to them: Chapter 81 (Compensation for Work Injuries) (by reason of the definition of "employee" in section 8101(1) of title 5); subchapters II and III of Chapter 83 (Retirement) (by reason of the definitions of "employee" in sections 8311(1) and 8331(1)(A), respectively, incorporating by reference the section 2105 definition); Chapter 84 (Federal Employees' Retirement System) (by reason of the definition of "employee" in section 8401(11)(A), incorporating the definition in section 8331(1)(A) by reference); Chapter 85 (Unemployment Compensation) (by reason of the definitions of "Federal service" and "Federal employee") in section 8501(1) and (3), respectively; Chapter 87 (Life Insurance) (by reason of the definition of "employee" in section 8701(a)(1), incorporating by reference the definition in section 2105); and Chapter 89 (Health Insurance) (by reason of the definition of "employee" in section 8901(1)(A), also incorporating by reference the section 2105 definition).

TITLE III—TECHNICAL CORRECTIONS

Section 301 of the Committee bill would postpone from November 18, 1988, to September 1, 1989, the effective date of the amendment made by section 204 of the Veterans' Judicial Review Act (division A of Public Law 100-687) to section 4004(b) of title 38, United States Code, relating to the reopening of disallowed Board of Veterans' Appeals cases.

Prior to the enactment of Public Law 100-687, section 4004(b) of title 38 provided that generally a claim disallowed by the BVA would not thereafter be reopened and no claim based on the same facts would be considered. However, section 4004(b) then stated that the BVA "may authorize" the reopening of a claim and review the former decision if new and material evidence "in the form of official reports from the proper service department" was secured.

As amended by section 204 of Public Law 100-687, effective as of the date of that statute's enactment, November 18, 1988, section 4004(b) retains the general prohibition against reopenings but does not provide directly for a reopening based on new and material evidence. Rather, new section 4004(b) accomplishes the latter by reference to a new section 3008 (as added by section 103(a) of Public Law 100-687), which provides that if new and material evidence regarding a disallowed claim is presented or secured—regardless of the source of that evidence—VA "shall open the claim and review the former disposition of the claim." However, under section 401(a) of Public Law 100-687, the new broader and mandatory provision in section 3008 does not take effect until September 1, 1989, leaving a conceptual gap, as far as statutory provisions are concerned, in the authority for reopenings in certain cases. The Committee bill, by postponing the effective date of the amendment to section 4004 and making that postponement effective as of November 18, 1988, the enactment date of Public Law 100-687, would fill that gap and harmonize the two provisions.

TITLE IV—MISCELLANEOUS PROVISIONS

Section 401 of the Committee bill would make a technical correction in section 12(c)(2) of the Department of Veterans Affairs Act (Public Law 100-527) so as to provide for certain non-career and excepted-service appointments to be made in the Department of Veterans Affairs without regard to the provisions of section 12(c)(1) of that Act which preclude consideration of political affiliation or activity. This corrects an inadvertent oversight in the drafting of that Act and has been cleared with the Government Affairs Committee which has basic jurisdiction over that Act.

Section 402 of the Committee bill would provide that in the event of a vacancy in the office of the chief judge, the most senior associate judge, in terms of service on the Court, would serve as acting chief judge, unless and until the President designates one of the other associate judges to serve as the acting chief judge. This provision would fill a void in present chapter 72, which does not provide for the designation of an acting chief judge.

COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee submits the following estimate from the Congressional Budget Office of costs resulting from the enactment of the Committee bill:

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

Robert D. Reischauer
Director

July 12, 1989

Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Congressional Budget Office has reviewed S. 1243, as introduced in the Senate. This bill would create a retirement system for veterans appeals judges. The new system would provide judges with a retirement benefit equal to their final salary. CBO estimates that enactment of S. 1243 would not significantly affect federal revenues or outlays through fiscal year 1994.

The election to participate in the Court retirement system could be made at any time while the individual is serving as a judge. If a judge is already covered under the civil service retirement system, his or her service would continue to be covered under that system until the judge elects to participate in the Court retirement plan. Upon electing to participate in the Court retirement plan, a judge would be required to deposit in the Court retirement fund contributions for any period of judicial service prior to the election to participate. The judge would then be entitled to a lump-sum refund of all prior civil service payroll contributions.

According to information from the Committee on Veterans' Affairs, there would be a maximum of 7 veterans appeals judges. To meet the minimum retirement requirements, a judge would have to be 65 and work in the Court of Veterans Appeals for 15 years or, if the judge is over 65 and has worked in the Court of Veterans Appeals for at least 10 years, the sum of the judge's years of service and attained age must be 80 or greater. A judge who becomes disabled could retire before meeting the minimum age and service requirements. This estimate assumes no retirement benefits would be paid over the projection period because no judge could meet the minimum service requirements stated above. Outlays could be positive if disability retirement benefits were paid over the period.

The bill would also allow judges choosing the new retirement system to participate in the survivors annuity plan. A survivors annuity would be payable only if the judge had at least five years of civilian service. This estimate assumes no survivor benefits would be paid over the projection period.

This new retirement system would be funded by contributions from judges' salaries and by federal government payments to eliminate any unfunded liability created by the new system. A one percent deduction would be taken from the salary of each participating judge. Judges choosing to participate in the survivors annuity plan would have an additional 3.5 percent deducted from their salaries. Revenues to the federal government would vary depending on how judges' contributions to the Court retirement and survivors annuity plans differ from the contributions they otherwise would have made to the Federal Employees' Retirement System.

Federal payments to eliminate any unfunded liability would be made through annual appropriations. These payments would be intrabudgetary and would be offset within the budget, having no direct effect on federal outlays.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cathy Ellman (226-2820).

Sincerely,

for
Robert D. Reischauer
Director

cc. Honorable Frank H. Murkowski
Ranking Minority Member

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact which would be incurred in carrying out the provisions of the Committee bill. The Committee finds that the bill would not entail significant regulation of individuals or businesses or result in any significant impact on the personal privacy of any individuals and the paperwork resulting from enactment would be minimal.

TABULATION OF VOTES CAST IN COMMITTEE

Pursuant to paragraph 7(b) of rule XXVI of the Standing Rules of the Senate, the Committee announces that at the Committee's July 13, 1989, meeting, the Committee voted by voice vote to report favorably to the Senate S. 1243 with amendments.

AGENCY REPORTS

By letters dated June 23, 1989, Chairman Cranston requested the Office of Management and Budget and the Department of Veterans Affairs to submit views on S. 1243 as introduced. The responses follow:

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 12, 1989

Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in reply to your Committee's request for the views of this Office on S. 1243, the "Court of Veterans Appeals Judges Retirement Act."

Title I of the bill would establish an optional, special retirement and survivor benefits plan for the seven judges of the new Court of Veterans Appeals. This system would be in lieu of the coverage available to the judges under the Federal Employees' Retirement System (FERS) or the Civil Service Retirement System (CSRS).

The special retirement plan proposed by Title I is patterned after the special systems established by law for judges of the U.S. Tax Court and for Bankruptcy Judges and Magistrates. There are, however, a number of technical defects which have been identified by the Departments of Labor and the Treasury, and by the Administrative Office of the United States Courts in letters to this Office. We are enclosing for Committee consideration excerpts from those letters which discuss changes needed to improve the special plan. We would also point out that Title I contains no provision for annuity benefits for former spouses of Court of Veterans Appeals judges. Such benefits are currently provided in the recently-enacted retirement system (Public Law 100-659) for Bankruptcy Judges and Magistrates, approved November 15, 1988, and in the military retirement system as well as FERS and CSRS. We believe the Committee should consider incorporating a provision for former spouses in Title I of the bill.

With respect to the cost of the new retirement system, for fiscal years 1990 to 1994, we estimate that there will be no budget outlays from the Court of Veterans Appeals Retirement Fund for annuity benefits. This assumes that none of the newly-appointed judges will retire during this time.

There could, however, be budget authority and intragovernmental outlays for the Court's retirement system beginning as early as FY 1990. Proposed Section 4098(e)(2)(A) of title 38, United States Code, would require the Court to transfer an amount to the Treasury sufficient to eliminate any unfunded liability of the Fund. Given that the Veterans Appeals Court judges' contribution under the bill would be only one percent of pay, and retirement annuities could equal full salary, the annual amount needed to eliminate the Fund's unfunded liability will depend on how many of the Veterans Appeals Court judges elect benefits under this bill. Since only one of the judges has been confirmed to date, any estimate of the cost at this time would be conjecture.

Section 201 of Title II would require the transfer of up to $3.1 million from other accounts of the Department of Veterans Affairs to the new Court. This provision has been overtaken by approval on June 30, 1989, of Public Law 101-45, making supplemental appropriations for the Department. That law provides $3.1 million for the Court. Accordingly, we recommend that section 201 of the bill be deleted.

Section 202 of Title II would direct the General Services Administration (GSA) to acquire space for the Court in the Old Post Office building adjacent to Union Station. Section 202 is contrary to GSA's basic statutory authority to assign space in government-owned or leased buildings. It also would undo ongoing and longstanding negotiations for use of the Old Post Office space for the Bureau of Labor Statistics. Section 202 is strongly opposed by GSA in its memorandum to this office (copy enclosed) and by the Department of Labor in the letter it is sending to your Committee. We concur in the views expressed by these agencies and, accordingly, recommend that section 202 be deleted or modified in a manner to meet the objections of GSA and the Department of Labor.

Other provisions of the bill address such matters as expedited hiring authority for the court, rules of procedure, and certain technical corrections in the laws establishing the Court and the Department.

Finally, we would have no objection to an increase in the salary of Associate Judges of the Court of Veterans Appeals, as suggested in Judge Nebeker's letter to you of June 9, 1989. Such an increase would place the new Court's salary structure on a par with other Federal appeals courts.

Subject to the deletion of Section 201 and the deletion or acceptable modification of Section 202, and to the Committee's consideration of technical comments on the retirement plan, the Administration would support the enactment of S. 1243.

Cordially,

William M. Diefenderfer III
Deputy Director

Enclosures

Department of Labor Technical Comments on H.R. 2727 and S. 1243

The bill raises certain technical questions. Under the bill, a judge who elects to participate in the proposed Court of Veterans Appeals retirement plan would be "cashed-out" of the civil service retirement system and paid a lump-sum calculated under 5 U.S.C. 8331(8). It is not clear how this would affect those who participate in the Federal Employees' Retirement System Act of 1986 (FERSA) Thrift Savings Plan (TSP). It is also unclear how this provision for lump sum payment of civil service retirement benefits would affect the spousal protection provisions of FERSA (5 U.S.C. 8435). In general, it may be helpful to define two terms used in the bill. One is "retired pay" which has a specific meaning within the military retirement system and the other is "civil service retirement." It is not clear which civil service retirement systems are meant to be included in the bill.

Department of the Treasury Technical Comments on H.R. 2727 and S. 1243

The investment language in proposed section 4098(f) fails to conform to longstanding Treasury investment policy. That section should be amended to read as follows:

> "At the request of the chief judge, the Secretary of the Treasury shall invest excess monies in the fund in public debt securities with maturities suitable to the needs of the fund, as determined by the chief judge, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligation of the United States of comparable maturities."

In view of the foregoing, the Department opposes proposed section 4098 (f) in the bill.

July 6, 1989

MEMORANDUM FOR LEGISLATIVE REFERENCE DIVISION
OFFICE OF MANAGEMENT AND BUDGET

FROM: AL VICCHIOLLA
CHIEF LEGISLATIVE COUNSEL
GENERAL SERVICES ADMINISTRATION

SUBJECT: Section 202 of the "Court of Veterans Appeals Judges Retirement Act"

The General Services Administration (GSA) has reviewed section 202 of the bill. With the exception of section 202, GSA has no comment on this draft legislation, which would amend title 38 of the United States Code to establish a retirement and benefit program for the judges of the United States Court of Veterans Affairs. GSA does, however, strongly oppose section 202 of this bill, which would require the Administrator of General Services (Administrator) to provide approximately 30,000 square feet of space on the first floor of the City Post Office adjacent to Union Station in the District of Columbia for use by the Court of Veterans Affairs. Specifically, GSA opposes the provision for the following reasons:

1. First, section 202 of this bill is contrary to section 210(e) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(e)), which statutorily authorizes the Administrator, following consultation with the heads of affected executive agencies, to assign and reassign space of all executive agencies in Government-owned and leased buildings both in and outside the District of Columbia. Section 210(e) further provides that the Administrator may make such an assignment orreassignment once he has made a determination that it would be advantageous to the Government in terms of economy, efficiency, or national security. Therefore, GSA views section 202 as inappropriate since, in effect, it grants an arm of the judicial branch the ability to dictate to an executive agency how that executive agency will perform its statutory duty regarding the assignment of space.

2. Second, section 202 would defeat ongoing negotiations for a lease that GSA has been conducting with the United States Postal Service (USPS), on behalf of the Bureau of Labor Statistics (BLS) and the Architect of the Capitol (AOC). The space needs of these two entities are such that both can barely be accommodated in the

building. While GSA is reasonably confident that we can consolidate BLS as well as house the Congressional Offices designated by the AOC in the City Post Office, we are certain that there is no leased space available for any other function. Thus, GSA cannot accommodate even marginal uses, much less a 30,000 square foot requirement plus unspecified expansion space.

3. Finally, GSA notes that the provision authorizing additional space for the United States Veterans Court adjacent to the 30,000 square "under such terms and conditions" and "with proper notice" is inconsistent with GSA leasing practices. Specifically, GSA does not provide space to tenant agencies under terms that permit GSA to terminate previous agreements at any time. Therefore, even if the more serious problems raised in the first and second point did not exist, this latter provision for additional space would have no practical effect, since there never would be a time when both the requisite "terms and conditions" and "proper notice" were met.

4. Finally, GSA opposes section 202 because GSA believes that the long term space needs of the Court of Veterans Appeals can be achieved without use of special legislation. Rather, the Court's long term space needs can and should be accomplished by means of the GSA competitive lease process.

In conclusion, GSA strongly opposes section 202 of this bill for the reasons cited in this memorandum.

SUBJECT: Draft Bill - Court of Veterans Appeals Judges Retirement Act

The Administrative Office has reviewed the bill transmitted to us by your office. Although we do not have jurisdiction over this court, we are offering what we hope are helpful comments comparing this new system with the systems already in existence for other judges.

I have attached an in-depth comparison done by our General Counsel's office. There are some main points we think should be considered in further drafting:

o It is unclear whether the bill contains a COLA for the basic annuity.

o There appears to be no provision for recalling judges to service.

o The surviving spouse provisions appear harsher than in other systems - the spouse must have been married for two years in order to receive an annuity and if there are no dependent children, the spouse does not receive an annuity until age 50. In addition, the judge would have had to have five years of service, instead of the usual 18 months, in order for the spouse to qualify for an annuity.

o Generally, it is up to the agency to run their retirement system and it works well that way.

o § 4097(d) indicates that the chief judge can set the conditions for installment payments. This could differ from judge to judge. It would be better to have one system set up for eveyone. Also specific amounts should be required.

o You may want to add to § 4097(f)(3) that the annuity would also be terminated upon reaching age 18 or 22 if a student.

SUBJECT: Retirement Bill for Judges of Court of Veterans Appeals

Set forth below is a brief outline comparing the draft retirement bill for judges of the Court of Veterans Appeals with retirement provisions applicable to bankruptcy judges and magistrates.

The draft bill would establish a new subchapter V in chapter 72 of title 38 of the United States Code, entitled "Retirement and Survivors Annuities." Although the statement of Senator Cranston regarding the Senate version of the bill indicates that the proposed retirement system is modeled after the retirement system for judges of the United States Tax Court, it also would be very similar to the new retirement system for bankruptcy judges and magistrates set forth at 28 U.S.C. § 377. In addition, the draft bill would establish a program of survivor annuities for judges of the Court of Veterans Appeals that would be very similar to the Judicial Survivors' Annuities System, set forth at 28 U.S.C. § 376. Although JSAS was established as a program for the survivors of Article III judges, the retirement statute for bankruptcy judges and magistrates allows those officials to participate in JSAS as well.

1. BASIC RETIREMENT PROVISIONS

- In the case of both Veterans Appeals judges and bankruptcy judges and magistrates, the annuity equals the salary at the time of retirement. The basic age and service requirements for retirement under title 38, chapter 72, subchapter V, would be the same as for Article III judges, i.e., age 65 with 15 years of service, age 66 with 14 years, etc., up to age 70 with 10 years of service. A bankruptcy judge or magistrate may retire at age 65 after 14 years of service. In addition, a bankruptcy judge or magistrate with at least 8 but less than 14 years of service may retire and receive, at age 65, an annuity equal to that portion of the salary being received at the time the judge or magistrate leaves office which the number of years of service, not to exceed 14, bears to 14. The annuity is reduced by 1/6 of one percent for each full month the judge or magistrate was under 65 at the time of leaving office, but the maximum reduction is 20 percent.

- Both the bill and the retirement system for bankruptcy judges and magistrates contain provisions for retirement upon failure of reappointment. Judges of the Court of Veterans Appeals are appointed for a term of 15 years. A judge who is not reappointed after serving at least one full term may retire and receive an annuity upon completion of that term, regardless of age. A bankruptcy judge or magistrate who is not reappointed after completion of at least one full term of office (14 years in the case of a bankruptcy judge, 8 years in the case of a magistrate) receives an annuity equal to the portion of the salary received at the time the judge or magistrate leaves office which the number of years of service (not to exceed 14) bears to 14. A bankruptcy judge or magistrate who retires under this provision does not receive an annuity until the age of 65.

- A Veterans Appeals judge who became permanently disabled would be permitted to retire and receive the salary in effect at the time of retirement if the judge had served for at least ten years. A disabled judge who served for less than ten years would receive one-half of the pay in effect at the time of retirement. These provisions are comparable to the provisions for Article III judges who become disabled. A bankruptcy judge or magistrate who becomes disabled after serving at least five years but less than 10 may retire and receive an annuity equal to 40 percent of salary at the time of retirement. A bankruptcy judge or magistrate who has served for at least 10 years receives an annuity equal to the proportion of the salary being received at the time of retirement which the number of years of service, not to exceed 14, bears to 14.

- The draft bill does not appear to contain any provision for cost-of-living increases in the basic annuity for judges of the Court of Veterans Appeals. A bankruptcy judge or magistrate is entitled to the same COLAs as Civil Service Retirement System annuitants.

- Judges of the Court of Veterans Appeals would be under the Civil Service Retirement System or the Federal Employees' Retirement System, as appropriate, unless they affirmatively elected the new retirement system. Similarly, bankruptcy judges and magistrates are under CSRS or FERS unless they elect 28 U.S.C. § 377. A Veterans Appeals judge would be permitted to make an election at any time before leaving office (except that a judge who is not reappointed would be permitted to make an election at any time before the day after the day on which a successor takes office). 28 U.S.C. § 377 contains no time limit for election of that system. A Veterans Appeals judge would be permitted to revoke an election prior to retirement. There is no provision for revocation of an election by a bankruptcy judge or magistrate.

- A Veterans Appeals judge who elected chapter 72, subchapter V, would no longer be eligible for a CSRS or FERS annuity and would receive a lump-sum refund of contributions to CSRS or FERS. Similar provisions apply to bankruptcy judges and magistrates who elect section 377.

- Veterans Appeals judges would contribute one percent of salary to the retirement plan. Sufficient withholdings and/or deposits must be made to cover 15 years of service. Bankruptcy judges and magistrates also contribute one percent of salary to the section 377 retirement system, but withholdings and deposits need only cover 14 years of service. A Veterans Appeals judge who revoked election of chapter 72, subchapter V, would be entitled to a refund of contributions, along with three percent interest; however, if the judge desired CSRS or FERS credit for that period of service, a deposit would have to be made, with interest. As previously indicated, judges and magistrates may not revoke election of section 377.

- Bankruptcy judges and magistrates may not practice law after retirement without forfeiting their COLAs and the opportunity to be recalled. No such provision appears in the Veterans Appeals bill, but I also cannot find any provision for COLAs or recall.

2. SURVIVOR ANNUITIES

- The draft bill contains a system of survivor annuities very similar to JSAS. Like bankruptcy judges and magistrates, Veterans Appeals judges would be permitted to elect the system. The bill would permit a Veterans Appeals judge to make such an election at any time while in office. In contrast, bankruptcy judges and magistrates must elect JSAS within six months after (i) the date of taking office, (ii) the date of marriage, or (iii) November 15, 1988, the date of enactment of the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988. Article III judges must elect JSAS within six months of the date of taking office or the date of marriage.

- A Veterans Appeals judge would contribute 3.5 percent of pay, including retirement pay, to the survivor annuities system. The JSAS contribution is 5 percent of pay, including retirement pay. In both cases, a deposit generally must be made to cover prior Federal service; if no deposit is made, either the annuity is reduced or the prior service is disregarded in computing the annuity.

- A surviving spouse of a Veterans Appeals judge would receive an annuity only if married to the judge for at least two years at the time of the judge's death, or a parent of children by the marriage. A surviving spouse of a judge or other official under JSAS need only have been married to the deceased individual for one year, or be a parent of children by the marriage. Children entitled to an annuity would be defined in the same manner as under JSAS.

- The surviving spouse of a Veterans Appeals judge with no dependent children would not receive an annuity until the age of 50, if under that age when the judge dies; a surviving spouse with dependent children would receive an immediate annuity. Under JSAS, a surviving spouse receives an immediate annuity, regardless of age or the existence of dependent children. In the case of both programs, the surviving spouse's annuity terminates upon death or remarriage before age 55.

- A Veterans Appeals judge would be required to have at least five years of service in order for survivors to receive an annuity. Under JSAS, only 18 months of service are necessary to entitle survivors to an annuity.

- The significant provisions of the draft bill regarding calculation of annuities, what constitutes creditable service, and deposits for creditable service are substantially the same as the corresponding provisions of JSAS, except that the annuities payable in cases where there are surviving children but no surviving spouse would in some instances be smaller under JSAS than under the draft bill. In addition, JSAS annuitants, like CSRS retirees, receive COLAs equal to increases in the Consumer Price Index. Survivors of Veterans Appeals judges generally would receive COLAs equal to three-fifths of any increase in the salary of a judge.

- A Veterans Appeals judge who left office without entitlement to an annuity or who ceased to be married would be permitted to revoke election of the survivor annuities system and receive a refund of contributions, with interest. Under JSAS, an individual who leaves office without entitlement to an annuity receives a refund of contributions. However, the JSAS statute does not permit revocation of an election of JSAS on the ground that an individual is no longer married.

The draft bill contains provisions that relate to matters other than retirement, including funding, facilities, and hiring of employees for the Court of Veterans Appeals. The present memorandum does not comment on those provisions.

Office of the
Administrator
of Veterans Affairs

Washington DC 20420

Veterans
Administration

JUL 12 1989

Honorable Alan Cranston
Chairman, Committee on
Veterans' Affairs
United States Senate
Washington, D.C. 20515-6375

Dear Mr. Chairman:

I am pleased to furnish the views of the Department of Veterans Affairs (VA) on S. 1243, 101st Congress, a bill "to establish a retirement and survivor benefit program for judges of the new United States Court of Veterans Appeals, and for other purposes." Subject to the qualifications below, we favor enactment of the proposal.

Title I of the bill provides for the disability and retirement of judges of the Court of Veterans Appeals (CVA), and would establish a retirement and survivors annuity program. It also contains conforming amendments regarding the Civil Service Retirement System, Federal Employees Retirement System, and standards for removal of judges. Enactment of title I would not affect the administration of veterans' benefits programs nor judicial review of VA actions before the Court, and we will therefore not comment.

Title II of the bill pertains to the establishment and operation of the CVA. Section 201 would require transfer of up to $3.1 million from several VA revolving funds to the CVA to pay for the start-up costs and operation of the Court until resources for the Court are properly appropriated by Congress.

On June 30, 1989, the President signed into law Public Law 101-45, 103 Stat. 97, which among other things provides $3.1 million in supplemental appropriations for the initial expenses of the Court. The perceived need addressed in section 201 is now moot.

Section 202 of the bill would, subject to certain conditions, direct the Administrator of the General Services Administration (GSA) to acquire space for the CVA in the Post Office Building adjacent to Union Station in the District of Columbia. Because this provision pertains to matters outside the responsibilities of VA, however, we defer comment on Section 202 to other agencies directly concerned.

Section 203 would extend the statutory deadline for filing a notice of appeal in the CVA under new section 4066 of title 38, United States Code. It would provide that an appellant may timely file a notice of appeal in the court up to 30 days after the date on which the CVA publishes a notice in the Federal Register announcing the commencement of its operation. We endorse this proposal as a means of assuring that no person is prejudiced by the possibility of the Court's commencing operations more than 120 days after the date of a decision of the Board of Veterans Appeals which would otherwise be eligible for judicial review. Since any BVA decision following a November 18, 1988, or later notice of disagreement is eligible for review in the CVA, and a number of such decisions have been issued, it is at least theoretically possible that a person's appellate rights might lapse by expiration of the 120-day period before the Court begins accepting appeals. Thus, the amendment proposed in section 203 would preserve the appellate rights of persons while the Court is in a state of genesis.

Section 204 of the bill would apply the Federal Rules of Appellate Procedure (FRAP) to the CVA until the Court adopts its own rules of practice and procedure. The FRAP are a comprehensive system of rules of general applicability in the Federal Courts of Appeals. They are accessible and functional, and are the product of many years of experience of the bench and bar. Adoption of these rules in the interim, while the Court assesses its needs and gains experience with veterans' cases, would ease the initial administrative burden on the CVA. Consequently, we do not object to enactment of section 204. Moreover, we understand that Chief Judge Nebeker has indicated his desire for such interim legislation.

Section 205 would authorize the CVA or, in particular, the Chief Judge to make up to 35 initial employee appointments without regard to the competitive-service strictures of title 5, United States Code. Such employees would later be permitted to convert to competitive-service status upon proper application and approval by the Director of the Office of Personnel Management (OPM).

Public Law 101-45 contains authority for the appointment, during fiscal year 1989, of up to 35 Court employees without regard to the provisions of title 5. Thus, section 205 of the bill has been essentially obviated, and we recommend its deletion.

Title III of the bill would make several technical corrections to the Veterans' Judicial Review Act (the Act), division A of Public Law 100-687. Section 301 would amend section 401(d) of the Act to specify that statutory provisions governing reopened claims before the BVA will take effect on September 1, 1989. We support this proposal, as it harmonizes the reopened-claim provision applicable to the BVA with similar provisions applicable to agencies of original jurisdiction under section 103 of the Act.

Section 302, in several subsections, would first amend section 3301(b)(1) of title 38 to authorize the Administrator (Secretary) to disclose pertinent files and other information to independent medical experts. We support this provision as it is necessary to facilitate the implementation of new section 3009 of title 38. It also conforms the statute to similar provisions applicable to the BVA.

Section 302 would also modify the jurisdiction of the United States Court of Appeals for the Federal Circuit in reviewing the decisions of the CVA. It would eliminate a provision delegating authority to the appeals court to overturn statutes found to be arbitrary, capricious, or an abuse of discretion. Unless this amendment is made, the Court of Appeals would ostensibly have the power to invalidate statutes with which it disagrees on nonconstitutional grounds, thereby enabling the Court to "legislate." We believe the scope of new section 4092(d)(1) of title 38 currently raises serious constitutional questions, and thus favor the amendment of this statute.

In addition, section 302 would redesignate section 223 of title 38, as enacted by the Veterans' Benefits and Services Act of 1988, Public Law 100-322, as section 224. We favor this amendment as it would alleviate the redundant numbering of two sections of title 38, section 223 as added by Public Law 100-322 and section 223 as added by Public Law 100-687.

Title IV of the bill would amend miscellaneous provisions of law pertaining to the operation of VA and the CVA. Section 401 would exempt two categories of appointees, non-career Senior Executive Service employees and certain persons in confidential or policymaking positions, from the prohibition against consideration of political affiliation and activity. We endorse this provision as an important clarification of the law governing the appointment process.

Section 402 would provide for the appointment of an acting chief judge of the CVA in the event of a vacancy. We have no objection to this provision, as it simply provides a method of succession on the Court. We note, however, that the amendment does not specify whether an acting chief judge would be entitled to the salary and the concomitant retirement benefits of a chief judge.

Section 403 would grant the CVA authority to hire experts and consultants under section 3109 of title 5, U.S. Code. Inasmuch as Public Law 101-45 authorizes the Court or, in certain instances, the Chief Judge to procure the services of experts and consultants, this section of the bill is unnecessary.

Finally, we would like to bring to the Committee's attention an ambiguity in the Act that should be addressed prior to the commencement of appeals to the CVA. Under section 211(a)(2) of title 38, section 101 of the Act, sovereign immunity is waived as to matters covered by sections 775 and 784 of title 38, that is, VA insurance matters. Historically, such insurance cases have been subject to judicial review in the U.S. District Courts following a final BVA decision.

Under section 4052(a) of title 38 as enacted by section 301 of the Act, however, the CVA now has exclusive jurisdiction to review decisions of the BVA, including insurance decisions. In our view, it is not clear in the Act nor its legislative history whether section 4052(a) is intended to supersede sections 775 and 784 of title 38, thereby implicitly divesting the U.S. District Courts of jurisdiction in all VA insurance cases appealed from the BVA, or whether the CVA and U.S. District Courts are to have concurrent jurisdiction in such cases, or whether the CVA is intended to have jurisdiction over appeals from BVA decisions except for insurance cases.

To rectify this ambiguity, we request that the following proposed amendment be incorporated into S. 1243: "Section 4052 is amended by striking out the first sentence of subsection (a) and inserting in lieu thereof 'the Court of Veterans Appeals shall have exclusive jurisdiction to review final decisions of the Board of Veterans' Appeals, except for matters arising under sections 775 and 784 of this title, which shall be brought against the United States only in the United States District Courts.'"

Enactment of S. 1243 would not entail significant benefit or administrative costs for the Department of Veterans Affairs.

The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the submission of this report on S. 1243 to the Congress.

Sincerely yours,

Edward J. Derwinski
Secretary

CHANGES IN EXISTING LAW MADE BY S. 1243 AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

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PART III—EMPLOYEES

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Subpart G—Insurance and Annuities

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CHAPTER 83—RETIREMENT

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SUBCHAPTER III—CIVIL SERVICE RETIREMENT

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§ 8334. Deductions, contributions, and deposits

(a)(1) * * *

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(i)(1) * * *

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(5) Notwithstanding any other provision of law, a judge who is covered by section 4096 of title 38 shall not be subject to deductions and contributions to the Fund, if the judge notifies the Director of the Office of Personnel Management of an election of a retirement annuity under that section. Upon such an election, the judge shall be entitled to a lump-sum credit under section 8342(a) of this title.

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CHAPTER 84—FEDERAL EMPLOYEES' RETIREMENT SYSTEM

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SUBCHAPTER I—GENERAL PROVISIONS

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§ 8402. Federal Employees' Retirement System; exclusions

(a) * * *

* * * * * * *

(f) A judge who is covered by section 4096 of title 38 shall be excluded from the operation of this chapter if the judge notifies the Director of the Office of Personnel Management of an election of a retirement annuity under that section. Upon such election, the judge shall be entitled to a lump-sum credit under section 8424 of this title.

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TITLE 38—UNITED STATES CODE

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PART I—GENERAL PROVISIONS

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CHAPTER 3—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

SUBCHAPTER I—VETERANS' ADMINISTRATION

Sec.
201. Veterans' Administration an independent agency.
202. Seal of the Veterans' Administration.
203. Availability of appropriations.

SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS

210. Appointment and general authority of Administrator; Deputy Administrator.
211. Decisions by Administrator; opinions of Attorney General.
212. Delegation of authority and assignment of duties.
213. Contracts and personal services.
214. Reports to the Congress.
215. Publication of laws relating to veterans.
216. Assistance to certain rehabilitation activities.
217. Studies of rehabilitation of disabled persons.
218. Security and law enforcement on property under the jurisdiction of the Veterans' Administration.
219. Evaluation and data collection.
220. Coordination and promotion of other programs affecting veterans and their dependents.
221. Advisory Committee on Former Prisoners of War.
222. Advisory Committee on Women Veterans.
223. Rulemaking: procedures and judicial review.
[223.] *224.* Administrative settlement of tort claims.

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SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS

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[§ 223.] *§ 224.* Administrative settlement of tort claims

(a) Notwithstanding the limitations contained in section 2672 of title 28, the Administrator may settle any claim for money damages against the United States cognizable under section 1346(b) or

2672 of title 28 or section 4116 of this title to the extent the authority to do so is delegated to the Administrator by the Attorney General. Such delegation may not exceed the authority delegated by the Attorney General to United States attorneys to settle claims for money damages against the United States.

(b) For purposes of this subsection, the term "settle", with respect to a claim, means consider, ascertain, adjust, determine, and dispose of the claim, whether by full or partial allowance or by disallowance.

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 57—RECORDS AND INVESTIGATIONS

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SUBCHAPTER I—RECORDS

§ 3301. Confidential nature of claims

(a) * * *

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(b) The Administrator shall make disclosure of such files, records, reports, and other papers and documents as are described in subsection (a) of this section as folllows:

(1) To a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone when, in the judgment of the Administrator, such disclosure would not be injurious to the physical or mental health of the claimant and to an independent medical expert or experts for an advisory opinion pursuant to section *3009 or* 4009 of this title.

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PART V—BOARDS AND DEPARTMENTS

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CHAPTER 72—UNITED STATES COURT OF VETERANS APPEALS

* * * * * * *

SUBCHAPTER V—RETIREMENT AND SURVIVORS ANNUITIES

4096. Retirement of judges.
4097. Survivor annuities.
4098. Court of Veterans Appeals Retirement Fund.

SUBCHAPTER I—ORGANIZATION AND JURISDICTION

* * * * * * *

§ 4053. Composition

(a) * * *

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(f)(1) A judge of the Court may be removed from office by the President on grounds of misconduct, neglect of duty, *or* engaging in the practice of [law, or physical or mental disability which, in the opinion of the President, prevents the proper execution of the judge's duties.] *law.* A judge of the Court may not be removed from office by the President on any other ground.

* * * * * * *

§ 4054. Organization

(a) * * *

* * * * * * *

(d) In the event of a vacancy in the position of chief judge of the Court, the associate judge senior in service on the Court shall serve as acting chief judge unless the President designates one of the other associate judges to serve as acting chief judge, in which case the judge so designated shall serve as acting chief judge.

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SUBCHAPTER III—MISCELLANEOUS PROVISIONS

§ 4081. Employees

[The Court of Veterans Appeals may appoint such employees as may be necessary to execute the functions vested in the Court. Such appointments shall be made in accordance with the provisions of title 5 governing appointment in the competitive service, except that the Court may classify such positions based upon the classification of comparable positions in the judicial branch. The basic pay of such employees shall be fixed in accordance with subchapter III of chapter 53 of title 5.]

(a) The Court of Veterans Appeals may appoint a clerk, who shall be subject to removal by the Court. The clerk, with the approval of the Court, may appoint necessary deputies and employees.

(b) The judges of the Court may appoint law clerks and secretaries in such numbers as the Court may approve.

(c) The Court may establish such requirements and procedures for the appointment, qualification, classification, and removal of the clerk and other employees of the Court as will promote the efficient operation of the Court without regard to the provisions of title 5. To the maximum extent feasible, the Court and the judges of the Court shall classify and compensate employees in a manner consistent with comparable positions in the judicial branch. Rates of compensation for employees of the Court may not exceed rates of compensation for comparable positions in the judicial branch.

(d) In making appointments under subsections (a) and (b) of this section, preference shall be given, among equally qualified persons, to persons who are preference eligibles (as defined in section 2108(3) of title 5).

(e) The Court may procure the services of experts and consultants under section 3109 of title 5.

(f) The chief judge of the Court may exercise the authority of the Court under this section whenever there are not at least two associate judges of the Court.

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SUBCHAPTER IV—DECISIONS AND REVIEW

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§ 4092. Review by United States Court of Appeals for the Federal Circuit

(a) * * *

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(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any **[**statute or**]** regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

* * * * * * *

SUBCHAPTER V—RETIREMENT AND SURVIVORS ANNUITIES

§ 4096. Retirement of judges

(a) For purposes of this section:

(1) The term "Court" means the United States Court of Veterans Appeals.

(2) The term "judge" means the chief judge or an associate judge of the Court.

(b)(1) A judge who meets the age and service requirements set forth in the following table may retire:

The judge has attained age:	***And the years of service as a judge are at least***
65	*15*
66	*14*
67	*13*
68	*12*
69	*11*
70	*10*

(2) A judge who is not reappointed following the expiration of the term for which appointed may retire upon the completion of that

term if the judge has served as a judge of the Court for 15 years or more. In order to retire under this paragraph, a judge must, not earlier than 9 months preceding the date of the expiration of the judge's term of office and not later than 6 months preceding such date, advise the President in writing that the judge is willing to accept reappointment to the Court.

(3) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall retire.

(c)(1) An individual who retires under subsection (b) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall (except as provided in paragraph (2) of this subsection) receive retired pay at the rate of pay in effect at the time of retirement.

(2) An individual who serves as a judge for less than 10 years and who retires under subsection (b)(3) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall receive retired pay at a rate equal to one-half of the rate of pay in effect at the time of retirement.

(3) Retired pay under this subsection shall begin to accrue on the day following the day on which the individual's salary as judge ceases to accrue and shall continue to accrue during the remainder of the individual's life. Retired pay under this subsection shall be paid in the same manner as the salary of a judge.

(d)(1) A judge may elect to receive retired pay under subsection (c) of this section. Such an election—

(A) may be made only while an individual is a judge (except that, in the case of an individual who fails to be reappointed as judge at the expiration of a term of office, the election may be made at any time before the date after the day on which the individual's successor takes office); and

(B) may not be revoked after the retired pay begins to accrue.

(2) In the case of a judge other than the chief judge, such an election shall be made by filing notice of the election in writing with the chief judge. In the case of the chief judge, such an election shall be made by filing notice of the election in writing with the Director of the Office of Personnel Management.

(3) The chief judge shall transmit to the Director of the Office of Personnel Management a copy of each notice filed with the chief judge under this subsection.

(e) If an individual for whom an election to receive retired pay under subsection (c) is in effect accepts compensation for employment with the United States, the individual shall, to the extent of the amount of that compensation, forfeit all rights to retired pay under subsection (c) of this section for the period for which the compensation is received.

(f)(1) Except as otherwise provided in this subsection, the provisions of the civil service retirement laws (including the provisions relating to the deduction and withholding of amounts from basic pay, salary, and compensation) shall apply with respect to service as a judge as if this section had not been enacted.

(2) In the case of any individual who has filed an election to receive retired pay under subsection (c) of this section—

(A) no annuity or other payment shall be payable to any person under the civil service retirement laws with respect to any service performed by such individual (whether performed before or after such election is filed and whether performed as judge or otherwise);

(B) no deduction for purposes of the Civil Service Retirement and Disability Fund shall be made from retired pay payable to that individual under subsection (c) of this section or from any other salary, pay, or compensation payable to that individual, for any period beginning after the day on which such election is filed; and

(C) such individual shall be paid the lump-sum credit computed under section 8331(8) or 8401(a)(19) of title 5, or whichever applies, upon making application therefor with the Office of Personnel Management.

(g)(1) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall certify to the President in writing that such permanent disability exists. If the chief judge retires for such a disability, the retirement of the chief judge shall not take effect until concurred in by the President. If any other judge retires for such a disability, the chief judge shall furnish to the President a certificate of disability signed by the chief judge.

(2) Whenever the President finds that a judge has become permanently disabled and as a result of that disability is unable to perform the duties of the office, the President shall declare that judge to be retired. Before a judge may be retired under this paragraph, the judge shall be provided with a full specification of the reasons for the retirement and an opportunity to be heard.

(h)(1) An individual who has filed an election to receive retired pay under subsection (c) of this section may revoke such election at any time before the first day on which retired pay would (but for such revocation) begin to accrue with respect to such individual.

(2) Any revocation under this subsection shall be made by filing a notice of the election in writing with the Director of the Office of Personnel Management. The Office of Personnel Management shall transmit to the chief judge a copy of each notice filed under this subsection.

(3) In the case of a revocation under this subsection—

(A) for purposes of this section, the individual shall be treated as not having filed an election to receive retired pay under subsection (c) of this section;

(B) for purposes of section 4097 of this title—

(i) the individual shall be treated as not having filed an election under section 4097(b) of this title, and

(ii) section 4097(e) of this title shall not apply and the amount credited to such individual's account (together with interest at 3 percent per year, compounded on December 31 of each year to the date on which the revocation is filed) shall be returned to the individual;

(C) no credit shall be allowed for any service as a judge of the Court unless with respect to such service either there has been deducted and withheld the amount required by the civil service retirement laws or there has been deposited in the Civil Service

Retirement and Disability Fund an amount equal to the amount so required, with interest;

(D) the Court shall deposit in the Civil Service Retirement and Disability Fund an amount equal to the additional amount it would have contributed to such Fund but for the election under subsection (d); and

(E) if subparagraphs (C) and (D) of this paragraph are complied with, service on the Court shall be treated as service with respect to which deductions and contributions had been made during the period of service.

(i)(1) Beginning with the next pay period after the Director of the Office of Personnel Management receives a notice under subsection (d) of this section that a judge has elected to receive retired pay under this section, the Director shall deduct and withhold 1 percent of the salary of such judge. Amounts shall be so deducted and withheld in a manner determined by the Director. Amounts deducted and withheld under this subsection shall be deposited in the Treasury of the United States to the credit of the Court of Veterans Appeals Judges Retirement Fund. Deductions under this subsection from the salary of a judge shall terminate upon the retirement of the judge or upon the completion of 15 years of service for which either deductions under this subsection or a deposit under subsection (j) of this section has been made, whichever occurs first.

(2) Each judge who makes an election under subsection (d) of this section shall be considered to agree to the deductions from salary which are made under paragraph (1) of this subsection.

(j) A judge who makes an election under subsection (d) of this section shall deposit, for service on the Court performed before the election for which contributions may be made under this section, an amount equal to 1 percent of the salary received for the first years, not exceeding 15 years, of that service. Retired pay may not be allowed until a deposit required by this subsection has been made.

(k) The amounts deducted and withheld under subsection (i) of this section, and the amounts deposited under subsection (j) of this section, shall be deposited in the Court of Veterans Appeals Retirement Fund for credit to individual accounts in the name of each judge from whom such amounts are received.

§4097. Survivor annuities

(a) For purposes of this section:

(1) The term "Court" means the United States Court of Veterans Appeals.

(2) The term "judge" means the chief judge or an associate judge of the Court.

(3) The term "pay" means salary received under section 4053(e) of this title and retired pay received under section 4096(c) of this title.

(4) The term "retirement fund" means the Court of Veterans Appeals Retirement Fund established under section 4098 of this title.

(5) The term "surviving spouse" means a surviving spouse of an individual who (A) was married to such individual for at least 2 years immediately preceding the individual's death, or (B) is a parent of issue by the marriage.

(6) The term "dependent child" has the meaning given the term "child" in section 376(a)(5) of title 28.

(7) The term "Member of Congress" means a Representative, a Senator, a Delegate to Congress, or the Resident Commissioner of Puerto Rico.

(b) A judge may become a participant in the annuity program under this section by filing a written election under this subsection while in office. Any such election shall be made in such manner as may be prescribed by the Court.

(c) There shall be deducted and withheld each pay period from the pay of a judge who has made an election under subsection (b) of this section a sum equal to 3.5 percent of the judge's pay. Amounts so deducted and withheld shall be deposited in the retirement fund. A judge who makes an election under subsection (b) of this section shall be considered by that election to agree to the deductions from the judge's pay required by this subsection.

(d) A judge who makes an election under subsection (b) of this section shall deposit, with interest at 3 percent per year compounded on December 31 of each year, to the credit of the retirement fund, an amount equal to 3.5 percent of the judge's pay and of the judge's basic salary, pay, or compensation for service as a Member of Congress, and for any other civilian service within the purview of section 8332 of title 5. Each such judge may elect to make such deposits in installments during the judge's period of service in such amounts and under such conditions as may be determined in each instance by the chief judge. Notwithstanding the failure of a judge to make such deposit, credit shall be allowed for the service rendered, but the annual annuity of the surviving spouse of such judge shall be reduced by an amount equal to 10 percent of the amount of such deposit, computed as of the date of the death of such judge, unless the surviving spouse elects to eliminate such service entirely from credit under subsection (k) of this section. However, a deposit shall not be required from a judge for any year with respect to which deductions from the judge's pay, or a deposit, were actually made (and not withdrawn) under the civil service retirement laws.

(e) If the service of a judge who makes an election under subsection (b) of this section terminates other than pursuant to the provisions of section 4096 of this title, or if any judge ceases to be married after making the election under subsection (b) of this section and revokes (in a writing filed as provided in subsection (b) of this section) such election, the amount credited to the judge's individual account (together with interest at 3 percent per year compounded on December 31 of each year to the date of the judge's relinquishment of office) shall be returned to the judge. For the purpose of this section, the service of a judge making an election under subsection (b) of this section shall be considered to have terminated pursuant to section 4096 of this title if—

(1) the judge is not reappointed following expiration of the term for which appointed; and

(2) at or before the time of the expiration of that term, the judge is eligible for and elects to receive retired pay under section 4096 of this title.

(f)(1) If a judge who makes an election under subsection (b) of this section dies after having rendered at least 5 years of civilian service

(computed as prescribed in subsection (l) of this section), for the last 5 years of which the salary deductions provided for by subsection (c) of this section or the deposits required by subsection (d) of this section have actually been made (and not withdrawn) or the salary deductions required by the civil service retirement laws have actually been made (and not withdrawn)—

(A) if the judge is survived by a surviving spouse but not by a dependent child, there shall be paid to the surviving spouse an annuity beginning with the day of the death of the judge or following the surviving spouse's attainment of the age of 50 years, whichever is the later, in an amount computed as provided in subsection (k) of this section; or

(B) if the judge is survived by a surviving spouse and a dependent child or children, there shall be paid to the surviving spouse an immediate annuity in an amount computed as provided in subsection (k) of this section and there shall also be paid to or on behalf of each such child an immediate annuity equal to the lesser of—

(i) 10 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

(ii) 20 percent of such average annual pay, divided by the number of such children; or

(C) if the judge is not survived by a surviving spouse but is survived by a dependent child or children, there shall be paid to or on behalf of each such child an immediate annuity equal to the lesser of—

(i) 20 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

(ii) 40 percent of such average annual pay, divided by the number of such children.

(2) The annuity payable to a surviving spouse under this subsection shall be terminated—

(A) upon the surviving spouse's death; or

(B) upon the remarriage of the surviving spouse before age 55.

(3) The annuity payable to a child under this subsection shall be terminated upon the child's death.

(4) In case of the death of a surviving spouse of a judge leaving a dependent child or children of the judge surviving the spouse, the annuity of such child or children under paragraph (1)(B) of this subsection shall be recomputed and paid as provided in paragraph (1)(C) of this subsection. In any case in which the annuity of a dependent child is terminated, the annuities of any remaining dependent child or children, based upon the service of the same judge, shall be recomputed and paid as though the child whose annuity was so terminated had not survived the judge.

(g) Questions of family relationships, dependency, and disability arising under this section shall be determined in the same manner as such questions arising under chapter 84 of title 5 are determined.

(h)(1) If—

(A) a judge making an election under subsection (b) of this section dies while in office (i) before having rendered 5 years of civilian service computed as prescribed in subsection (l) of this

section, or (ii) after having rendered 5 years of such civilian service but without a survivor entitled to annuity benefits provided by subsection (f) of this section; or

(B) the right of all persons entitled to an annuity under subsection (f) of this section based on the service of such judge terminates before a claim for such benefits has been established,

the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year, to the date of the death of such judge) shall be paid in the manner specified in paragraph (2) of this subsection.

(2) An amount payable under paragraph (1) of this subsection shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date title to the payment arises, in the following order of precedence:

(A) To the beneficiary or beneficiaries whom the judge designated in writing filed before death with the chief judge (except that in the case of the chief judge such designation shall be filed before death as prescribed by the Court).

(B) To the surviving spouse of the judge.

(C) To the child or children of the judge (and the descendants of any deceased children by representation).

(D) To the parents of the judge or the survivor of them.

(E) To the executor or administrator of the estate of the judge.

(F) To such other next of kin of the judge as may be determined by the chief judge to be entitled under the laws of the domicile of the judge at the time of the judge's death.

(3) Determination as to the surviving spouse, child, or parent of a judge for the purposes of paragraph (2) of this subsection shall be made without regard to the definitions in subsection (a) of this section.

(4) Payment under this subsection in the manner provided in this subsection shall be a bar to recovery by any other person.

(5) In a case in which the annuities of all persons entitled to annuity based upon the service of a judge terminate before the aggregate amount of annuity paid equals the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year to the date of the death of the judge), the difference shall be paid, upon establishment of a valid claim therefor, in the order of prcedence prescribed in paragraph (2) of this subsection.

(6) Any accrued annuity remaining unpaid upon the termination (other than by death) of the annuity of any individual based upon the service of a judge shall be paid to that individual. Any accrued annuity remaining unpaid upon the death of an individual receiving an annuity based upon the service of a judge shall be paid, upon the establishment of a valid claim therefor, in the following order of precedence:

(A) To the executor or administrator of the estate of that person.

(B) After 30 days after the date of the death of such individual, to such individual or individuals as may appear in the judgment of the chief judge to be legally entitled thereto.

Such payment shall be a bar to recovery by any other individual.

(i) When a payment under this section is to be made to a minor, or to a person mentally incompetent or under other legal disability adjudged by a court of competent jurisdiction, the payment may be made to the person who is constituted guardian or other fiduciary by the law of the State of residence of such claimant or is otherwise legally vested with the care of the claimant or the claimant's estate. If no guardian or other fiduciary of the person under legal disability has been appointed under the laws of the State of residence of the claimant, the chief judge shall determine the person who is otherwise legally vested with the care of the claimant or the claimant's estate.

(j) Annuities under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity has accrued. An annuity under this section is not assignable, either in law or in equity, or subject to execution, levy, attachment, garnishment, or other legal process.

(k)(1) The annuity of the surviving spouse of a judge making an election under subsection (b) of this section shall be an amount equal to the sum of the following:

(A) The product of—

(i) 1.5 percent of the judge's average annual pay; and

(ii) the sum of the judge's years of judicial service, the judge's years of prior allowable service as a Member of Congress, the judge's years of prior allowable service performed as a member of the Armed Forces, and the judge's years, not exceeding 15, of prior allowable service performed as a congressional employee (as defined in section 2107 of title 5).

(B) Three-fourths of 1 percent of the judge's average annual pay multiplied by the judge's years of allowable service not counted under subparagraph (A) of this paragraph.

(2) An annuity computed under this subsection may not exceed 50 percent of the judge's average annual pay and may not be less than 25 percent of such average annual pay. Such annuity shall be further reduced in accordance with subsection (d) of this section (if applicable).

(3) For purposes of this subsection, the term "average annual pay", with respect to a judge, means the average annual pay received by the judge for judicial service (including periods in which the judge received retired pay under section 4096(d) of this title) or for any other prior allowable service during the period of 3 consecutive years in which the judge received the largest such average annual pay.

(l) Subject to subsection (d) of this section, the years of service of a judge which are allowable as the basis for calculating the amount of the annuity of the judge's surviving spouse shall include the judge's years of service as a judge of the Court, the judge's years of service as a Member of Congress, the judge's years of active service as a member of the Armed Forces not exceeding 5 years in the aggregate and not including any such service for which credit is allowed for the purposes of retirement or retired pay under any other provision of law, and the judge's years of any other civilian service within the purview of section 8332 of title 5.

(m) Nothing contained in this section shall be construed to prevent a surviving spouse eligible therefor from simultaneously receiving an annuity under this section and any annuity to which such spouse would otherwise be entitled under any other law without regard to this section, but in computing such other annuity service used in the computation of such spouse's annuity under this section shall not be credited.

(n) A judge making an election under subsection (b) of this section shall, at the time of such election, waive all benefits under the civil service retirement laws. Such a waiver shall be made in the same manner and shall have the same force and effect as an election filed under section 4096(d) of this title.

(o) Whenever the salaries of judges paid under section 4053(e) of this title are increased, each annuity payable from the retirement fund which is based, in whole or in part, upon a deceased judge having rendered some portion of that judge's final 18 months of service as a judge of the Court, shall also be increased. The amount of the increase in the annuity shall be determined by multiplying the amount of the annuity on the date on which the increase in salaries becomes effective by 3 percent for each full 5 percent by which those salaries were increased.

§ 4098. Court of Veterans Appeals Retirement Fund

(a) There is established in the Treasury a fund known as the Court of Veterans Appeals Retirement Fund.

(b) Amounts in the fund are available for the payment of judges' retired pay under section 4096 of this title and of annuities, refunds, and allowances under section 4097 of this title.

(c) Amounts deposited by, or deducted and withheld from the salary and retired pay of, a judge under section 4096 or 4097 of this title shall be deposited in the fund and credited to an individual account of the judge.

(d) The chief judge of the Court of Veterans Appeals shall submit to the President an annual estimate of the expenditures and appropriations necessary for the maintenance and operation of the fund, and such supplemental and deficiency estimates as may be required from time to time for the same purposes, according to law.

(e)(1) The chief judge may cause periodic examinations of the retirement fund to be made by an actuary, who may be an actuary employed by another department of the Government temporarily assigned for the purpose.

(2)(A) Subject to the availability of appropriations, there shall be deposited in the Treasury to the credit of the retirement fund, not later than the close of each fiscal year, such amounts as may be required to reduce to zero the unfunded liability (if any) of the funds. Such deposits shall be taken from sums available for that fiscal year for the payment of the expenses of the Court.

(B) For purposes of subparagraph (A) of this paragraph, the term "unfunded liability", with respect to any fiscal year, means the amount estimated by the chief judge to be equal to the excess (as of the close of that fiscal year) of—

(i) the present value of all benefits payable from the fund (determined on an annual basis in accordance with section 9503 of title 31), over

(ii) the sum of—

(I) the present values of future deductions under sections 4096(i) and 4097(c) of this title and future deposits under sections 4096(j) and 4096(d) of this title, and

(II) the balance in the fund as of the close of the fiscal year.

(C) Amounts deposited in the retirement fund under this paragraph shall not be credited to the account of any individual.

(f) The Secretary of the Treasury shall invest from time to time, in interest-bearing securities of the United States, such portions of the retirement fund as in such Secretary's judgment may not be immediately required for payments from the fund. The income derived from such investments shall constitute a part of the fund.

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DEPARTMENT OF VETERANS AFFAIRS ACT

(Public Law 100–527, October 25, 1988)

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SEC. 12. MISCELLANEOUS EMPLOYMENT RESTRICTIONS.

(a) * * *

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(c) PROHIBITED EMPLOYMENT AND ADVANCEMENT CONSIDERATIONS.—(1) Political affiliation or activity may not be taken into account in connection with the appointment of any person to any position in or to perform any service for the Department of Veterans Affairs, or in the assignment or advancement of any employee in the Department.

(2) Paragraph (1) shall not apply to the appointment of *(A)* any person by the President under this Act, other than the appointment of the Chief Medical Director, the Chief Benefits Director, and the Inspector General of the Department of Veterans [Affairs.] *Affairs, or (B) any person to (i) a Senior Executive Service position as a noncareer appointee, or (ii) a position which is excepted from the competitive service, on a temporary or permanent basis, because of the confidential or policy-determining character of the position.*

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VETERANS' JUDICIAL REVIEW ACT

(Public Law 100–687, November 18, 1988)

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TITLE IV—EFFECTIVE DATES AND APPLICABILITY

SEC. 401. EFFECTIVE DATES.

(a) * * *

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(d) BOARD OF VETERANS' APPEALS.—Sections [202 through] *202, 203, 205, 206, and* 207 shall take effect [on] *as of* January 1, 1989. *Section 204 shall take effect on September 1, 1989.*

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